(1) 90-1795

No. 90-____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHROMALLOY PHARMACEUTICAL, INC.,
Petitioner,

v.

ROBERT J. BOYER, individually and as Executor of the Estate of MARSHA F. BOYER, deceased,
Respondent.

CHROMALLOY PHARMACEUTICAL, INC.,
Petitioner,

v.

SHERRIE SIMMERS and ROBERT A. SIMMERS, w/h and ROBERT S. SIMMERS, a Minor, by his parents and natural guardians, SHERRIE SIMMERS and ROBERT A. SIMMERS, w/h,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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Dated: May 21, 1991

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QUESTION PRESENTED

Does the Due Process Clause permit the forum-related contacts of a predecessor corporation to be attributed to its non-resident successor corporation for the purposes of establishing *in personam* jurisdiction where the non-resident successor has not purposefully sought any minimum contacts with the forum?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below are:

Boyer action:

Plaintiffs below:

Robert J. Boyer, individually and as Executor of the Estate of Marsha Boyer

Defendants below:

Children's Hospital of Philadelphia,
Heyden Products,
American Cyanamid Company,
Tenneco, Inc.,
Tenneco Resins, Inc. (formerly "Tenneco Chemical Co."),
Fellows Medical Manufacturing Co., Inc.,
Chromalloy Pharmaceutical, Inc.,
Forrest Pharmaceutical Laboratories, Inc.,
Chromalloy American Corporation and Eugene B. Spitz, M.D.

Simmers action:

Plaintiffs below:

Sherrie Simmers
Robert A. Simmers
Robert S. Simmers (a minor by his parents and natural guardians Sherrie and Robert A. Simmers)

Defendants below:

American Cyanamid Company,
Tenneco, Inc.,
Tenneco Resins, Inc.,
Fellows Medical Manufacturing Company, Inc.,
Chromalloy American Corporation,
Chromalloy Pharmaceutical, Inc.,
Forrest Pharmaceutical Laboratories, Inc.,
Heyden Products, Inc.,
The Children's Hospital of Philadelphia,
Radiology Dept. of Children's Hospital of Philadelphia,
Rovena Spenser, M.D.,
C.E. Koop, M.D.,
Joseph Stokes, Jr., M.D.

The petitioner here is Chromalloy Pharmaceutical, Inc. Chromalloy Pharmaceutical, Inc. is a wholly-owned subsidiary of Chromalloy American Corporation. Chromalloy Pharmaceutical, Inc. has no subsidiaries which are not wholly owned by it.

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October Term, 1990

CHROMALLOY PHARMACEUTICAL, INC.,
Petitioner,

v.

ROBERT J. BOYER, individually and as Executor of the Estate of MARSHA F. BOYER, deceased,
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SHERRIE SIMMERS and ROBERT A. SIMMERS, w/h and ROBERT S. SIMMERS, a Minor, by his parents and natural guardians, SHERRIE SIMMERS and ROBERT A. SIMMERS, w/h,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The Petitioner, Chromalloy Pharmaceutical, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of the Commonwealth of Pennsylvania entered on June 12, 1990.

OPINIONS BELOW

The opinion of the Superior Court of the Commonwealth of Pennsylvania is reported at 394 Pa. Super. 464, 576 A.2d 376 (1990) and is reprinted in the Appendix hereto ("Pet. App.") at A-1. The Order of the Supreme Court of Pennsylvania denying the petition for allocatur is not reported but is reprinted at Pet. App. A-29-30. The orders of the Court of Common Pleas of Philadelphia County of the Commonwealth of Pennsylvania denying this petitioner's challenge to jurisdiction and certifying this issue for appeal are reprinted at Pet. App. A-34-36 and Pet. App. A-32-33, respectively.

STATEMENT OF JURISDICTION

The decision and judgment of the Superior Court of the Commonwealth of Pennsylvania was entered on June 12, 1990 (Pet. App. at A-28). The Pennsylvania Supreme Court denied a timely petition for allocatur on February 22, 1991 (Pet. App. at A-29- 30). This petition is being filed within 90 days of that Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause is included in Section 1 of the Fourteenth Amendment to the United States Constitution, which provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The texts of the Pennsylvania statutes relating to jurisdiction, 42 Pa. Cons. Stat. Ann. §§ 5301 and 5322, are set forth at Pet. App. A-37-38 and Pet. App. A-38-41.

STATEMENT OF THE CASE

A. History of the Case

This petition arises from two product liability actions that were filed in 1987 in the Court of Common Pleas of Philadelphia County, Pennsylvania, against petitioner Chromalloy Pharmaceutical, Inc. ("CPI") and others.

The first action was brought by Robert J. Boyer individually and as Executor of the Estate of Marsha Boyer. Mr. Boyer claims that the administration of an x-ray contrast medium, Thorotrast, to his wife Marsha Boyer at Children's Hospital in Philadelphia in April, 1949, caused her subsequent illness and death. The *Boyer* action was filed on February 5, 1987.

The second action was brought by Sherrie Simmers, her husband and her son. They seek to recover for injuries allegedly sustained by Mrs. Simmers as a result of the administration to her of Thorotrast while she was a patient at Children's Hospital in Philadelphia in May, 1949. The *Simmers* action was filed on June 1, 1987.

CPI has never manufactured, sold or distributed Thorotrast. It has never conducted business in the Commonwealth of Pennsylvania nor been registered as a corporation either foreign or domestic in the Commonwealth of Pennsylvania. CPI did not even exist at the time of the acts complained of; rather it was incorporated in 1973, some 24 years after the administration of Thorotrast at issue here.

CPI's sole connection to these actions, as set forth in the record before the Pennsylvania Superior Court, is as follows. Between 1930 and 1953, Heyden Chemical Corporation ("Heyden") manufactured Thorotrast. Pet.

App. at A-3, A-27. Some of that Thorotrast was distributed in the Philadelphia area and administered to Mrs. Boyer and Mrs. Simmers at Children's Hospital in April, 1949, and May, 1949, respectively. Pet. App. at A-6. In 1953, Heyden sold its Antibiotic Division, which manufactured Thorotrast, to American Cyanamid Corporation ("Cyanamid"). Pet. App. at A-3. In 1954, Cyanamid in turn sold the rights to conduct the Thorotrast business to Testagar & Co., Inc. ("Testagar"). Pet. App. at A-4. In 1974, through a series of statutory mergers, CPI became the corporate successor to Testagar. Pet. App. at A-5.

CPI objected to the Pennsylvania trial court's assertion of jurisdiction in both the *Boyer* and *Simmers* actions. Its objections were denied, Pet. App. at A-34-36, the question of personal jurisdiction was certified to the Pennsylvania Superior Court for immediate appellate review, Pet. App. at A-32-33, and the cases were consolidated for appeal. Pet. App. at A-31. On June 12, 1990, the Pennsylvania Superior Court affirmed the trial court's ruling. Pet. App. at A-28. On February 22, 1991, the Pennsylvania Supreme Court denied CPI's petition for allocatur. Pet. App. at A-29-30. This petition followed.

B. The Decision of the Pennsylvania Superior Court

The Pennsylvania Superior Court defined the issue before it as

> a question of first impression in Pennsylvania — whether the forum-related contacts and actions of a predecessor corporation may be attributed to its successor [here, CPI] for the purposes of establishing in personam jurisdiction.

Pet. App. at A-2. The court proceeded to answer this question in two steps.

First, the court determined that under a principle of Pennsylvania product liability tort law known as the

"product line exception,"[1] CPI might be held liable for Heyden's allegedly tortious conduct in selling Thorotrast. Pet. App. at A-19. Next, the court determined that Heyden could have been sued in Pennsylvania because when Thorotrast was administered to Mrs. Boyer and Mrs. Simmers in Pennsylvania, Heyden was the manufacturer and distributor of Thorotrast. Pet. App. at A-23-24. On the basis of these two determinations, the court concluded that, because "sufficient 'minimum contacts' exist between the subject matter of the litigation, Heyden and the Commonwealth of Pennsylvania," CPI "as successor to Testagar and Heyden, is subject to the personal jurisdiction of the Pennsylvania courts." Pet. App. at A-24.

> In Pennsylvania, it is now the law that when the successor is subject to the liabilities of its predecessor, the acts of a predecessor corporation may be attributed to its successor for the purpose of determining whether jurisdiction is proper.

Pet. App. at A-26. In reaching this conclusion, at no point did the court examine the relationship between CPI and Pennsylvania to determine whether CPI had ever purposefully sought any minimum contacts with the forum.

REASONS FOR GRANTING THE WRIT

This Court's decisions establish that a forum may not exercise personal jurisdiction over a non-resident

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1. As articulated by the court below, "in Pennsylvania, successor liability has been expanded to include liability based on continuation of a predecessor's product line. Pet. App. at A-22. This "product line exception" to the general rule that a successor is not liable for a predecessor's obligations has been adopted in several states. *See Ray v. Alad Corp.,* 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Ramirez v. Amsted Indus., Inc.,* 86 N.J. 332, 431 A.2d 811 (1981); *Martin v. Abbott Laboratories,* 102 Wash. 2d 581, 689 P.2d 368 (1984). Accordingly, the issue presented here is likely to arise in other forums.

unless that non-resident purposefully availed itself of the forum and thus had fair warning that it might have to defend there. In each case reviewed, whether or not the Court has found personal jurisdiction to exist, the Court has reached its conclusion by evaluating the forum contacts of the defendant non-resident itself. *None* of the Court's decisions stands for the very different proposition adopted by the Pennsylvania Superior Court, that the jurisdictional inquiry may be satisfied by reviewing the contacts of an entity other than the non-resident.

The Pennsylvania Superior Court's decision that a non-resident with no Pennsylvania contacts can be subject to jurisdiction in Pennsylvania solely by virtue of the forum contacts of a predecessor requires review. The decision presents a jurisdictional question arising under the Due Process Clause of the United States Constitution and conflicts with decisions of this Court.

I. In Failing to Make Any Inquiry Regarding CPI's Contacts with Pennsylvania, The Pennsylvania Superior Court's Decision Violates the Due Process Clause and Conflicts With Decisions of This Court.

With its decision in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), this Court established the principle that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72 (1985) (citing *International Shoe,* 326 U.S. at 319). Each time thereafter, when evaluating whether jurisdiction could constitutionally be exercised over a non-resident defendant in a particular forum, the Court has enunciated and followed the same principle, that the non-resident itself must have sufficient contacts with the forum. The focus has never shifted to the forum contacts of any other entity.

In each case before the Court, the jurisdictional inquiry has been separate from any consideration of ultimate liability. The core question has been whether a defendant non-resident "purposefully avail[ed] itself of the privilege of conducting activities within the forum State" and thus could "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). The "unilateral activity of those who claim some relationship with a nonresident defendant" has never been enough to "satisfy the requirement of contact with the forum State." *Id.* at 298 (citing *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)). *Accord Burger King,* 471 U.S. at 475 ("[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself*") (emphasis in original); *Rush v. Savchuk,* 444 U.S. 320, 332 (1980) (the minimum contact "requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction"); *Shaffer v. Heitner,* 433 U.S. 186, 212 (1977) (Due Process analysis must be applied in evaluating "all assertions of state-court jurisdiction").

In *Rush v. Savchuk,* the Court rejected the concept that where a non-resident itself lacked sufficient forum contacts, jurisdiction could be exercised over the non-resident by virtue of the contacts of another party. In fact, the Court emphasized, it would be "plainly unconstitutional" to attribute contacts of another entity to the non-resident and on that basis alone exercise jurisdiction over the non-resident. 444 U.S. at 332. Likewise, "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 781 n. 13 (1984).

In conflict with this Court's decisions, the Pennsylvania Superior Court focused on the contacts of an entity

other than the non-resident, and on the non-resident's potential liability, under the "product line exception" of Pennsylvania tort law, for the conduct of that other entity. The court did not consider whether the non-resident itself had the requisite forum contacts to satisfy the Due Process Clause.[2] Disregarding the absence of any contacts between the non-resident and the forum state, the court instead combined principles of tort liability and jurisdiction, holding that once the non-resident might be found liable for its predecessor's torts, the predecessor's contacts with the forum could be attributed to the non-resident, and no jurisdictional

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2. The Pennsylvania Superior Court's holding has been set forth *supra* at p.5. In the course of its opinion, the court uttered *dicta* that should not be confused with its holding. The court stated, for example, that "[w]hen a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect . . . consents to the same jurisdictional qualities of its predecessor." Pet. App. at A-25. This statement is *dictum* because the court expressly found that whether CPI or any other entity had assumed Heyden's Thorotrast liabilities was in dispute: "If Heyden is found liable, then it must be determined who assumed this liability. Among numerous other substantive issues, there are disputes . . . concerning assumption of liability for Thorotrast related injuries when the administration of the drug occurred before the sale of Thorotrast to American Cyanamid." Pet. App. at A-24 n. 16.

The court also stated that "[a] successor which through a merger, consolidation or *de facto* merger is the corporate embodiment of its predecessor must not be permitted to immunize itself in a specific jurisdiction from the liabilities of its predecessor." Pet. App. at A-26. This, too, is *dictum,* because while the court found that CPI was the "corporate embodiment" of Testagar, Pet. App. at A-19, it expressly found that CPI was *not* the "corporate embodiment" of Heyden, the predecessor with minimum contacts. Pet. App. at A-17.

Thus, in exercising jurisdiction over CPI as a non-resident, the court by its own statements did not base its decision on any finding that CPI had assumed Heyden's liabilities or was Heyden's "corporate embodiment" by reason of merger, consolidation or *de facto* merger. To the contrary, the court recognized that it could not make any such findings and therefore established its jurisdiction solely by attributing Heyden's contacts to CPI as a "product line" successor.

inquiry regarding the non-resident's own forum contacts was necessary. This Court should exercise its discretion and grant certiorari to correct this decision.

II. The Pennsylvania Superior Court's Decision Also Conflicts With Decisions of Federal Courts of Appeal.

Several federal courts of appeals have considered the issue of whether a predecessor corporation's contacts may be attributed to a non-resident defendant successor corporation for purposes of establishing jurisdiction over the successor. In each case, the courts have focused on the forum contacts of the predecessor only where the "predecessor" and "successor" were, in reality, the same entity.

In *Williams v. Bowman Livestock Equipment Co.*, 927 F.2d 1128, 1132 (10th Cir. 1991), the court held that a predecessor's forum contacts could not be attributed to a successor where "there was neither a statutory merger or consolidation . . . nor a sale or transfer of all, or substantially all," of the predecessor's assets to the successor. Likewise, in *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 42 (8th Cir. 1988), the court held that jurisdictional contacts could not be attributed to a successor corporation where the successor did not exist "in essentially the same form as its corporate predecessors".

In the one appellate case in which a predecessor's jurisdictional contacts were attributed to a non-resident successor, the court held that where the predecessor corporation merged into the successor corporation, the contacts of the predecessor would be deemed those of the successor for jurisdictional purposes. *Duris v. Erato Shipping, Inc.*, 684 F.2d 352, 356 (6th Cir. 1982), *aff'd on other grounds, Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529 (1983). The court explained that its purpose was to avoid allowing corporations to "immunize themselves by formalistically changing their titles." *Id.*

Unlike these federal appellate decisions that have considered whether a predecessor's contacts may be attributed to a successor, the Pennsylvania Superior Court focused only on the forum contacts of the predecessor and the successor's potential tort liability. Whereas the federal appellate decisions tied jurisdiction to liability only when the successor and predecessor were found to be essentially the same entity, the Pennsylvania Superior Court held that jurisdictional contacts may be attributed to a different entity, as long as that different entity might as a successor be liable under tort law for its predecessor's torts. Because the Pennsylvania Superior Court's decision conflicts with the decisions of the federal courts of appeals, which permit attributing a predecessor's contacts to a successor only to prevent a "formalistic" change in corporate identity from defeating jurisdiction, the granting of certiorari is appropriate here.

III. The Pennsylvania Superior Court's Decision Raises A Substantial Question of Jurisdiction Which Should Be Resolved.

The exercise of jurisdiction over a non-resident has always been recognized as an issue of great importance to this Court. The significance of the question presented here is highlighted by the growing number of cases in which the issue has arisen and the conflicting decisions in those cases. While some courts have specifically followed this Court's mandate that the non-resident *itself* must have sufficient ties to the forum,[3] others have

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3. *Johnston v. Pneumo Corp.*, 652 F. Supp. 1402, 1406 (S.D. Miss. 1987) (predecessor's forum contacts would not be attributed to successor corporation that purchased all assets and assumed all liabilities of predecessor; "the Court must first gain jurisdiction over [the successor] before it could be subject to those liabilities"); *McElroy v. CABC, Inc.*, No. 3-83-0424-G (N.D. Tex. Sept. 8, 1983) (LEXIS, Genfed library, Dist file) ("the language of the Supreme Court in *Rush v. Savchuk* . . . leads to the inescapable conclusion that [plaintiff's 'revolutionary' argument that predecessor's contacts

indicated that attribution of a predecessor's contacts to a successor depends on the nature of the transaction between the successor and predecessor.[4]

The Pennsylvania Superior Court's decision conflicts with *all* of these decisions, by holding that a predecessor's contacts may always be attributed to the successor, simply because the successor is potentially liable for the predecessor's alleged torts and regardless of the nature of the transaction between it and the predecessor.

Moreover, the Pennsylvania Superior Court's decision has now been cited by one federal appellate court in

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should be 'carried over' to successor in interest] is untenable"); *Sullivan v. Fellows Testagar & Co., Inc.*, 518 So.2d 1111, 1113 (La. App. 1987) (court declined to "go beyond the clear words of [Louisiana long-arm] statute" to impute conduct of predecessor to successor and thereby assert jurisdiction over the successor).

4. *Inter-Americas Insurance Corp. v. Xycor Systems, Inc.*, 757 F. Supp. 1213, 1218 (D. Kan. 1991) (it would be appropriate to exercise jurisdiction over successor based on predecessor's contacts, only where (1) successor agreed to assume predecessor's debts; (2) transaction was consolidation or merger; (3) successor was "mere continuation" of predecessor; or (4) transaction was fraudulently entered into to escape liability. Where successor was secondarily liable on contract, it was "too attenuated for [successor] to reasonably expect being subject to Kansas jurisdiction"); *Bowers v. Neti Technologies, Inc.*, 690 F. Supp. 349, 361 (E.D. Pa. 1988) (corporation formed to avoid predecessor's liabilities "should have reasonably anticipated being haled into a Pennsylvania court once the sham was discovered"); *Goffe v. Blake*, 605 F. Supp. 1151, 1154 (D. Del. 1985) (predecessor's contacts "may be attributed to the surviving corporation following a merger"); *McDaniel v. Armstrong World Indust.*, 603 F. Supp. 1337 (D.D.C. 1985) (court would not attribute predecessor's forum contacts to successor which acquired the division which had manufactured the product at issue); *Cole v. Caterpillar Mach. Corp.*, 562 F. Supp. 179, 181 (M.D. La. 1983) (company "should not be immune from suit by its own actions, i.e., merging with another corporation"); *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939, 948 (D. Del. 1977) (predecessor's contacts would not be attributed to successor where plaintiff could not show that successor was "present-day embodiment" of predecessor).

support of the proposition that jurisdiction is automatically established, and no due process analysis is necessary, if there is *any* basis for successor liability. *City of Richmond v. Madison Management Group,* 918 F.2d 438, 454 (4th Cir. 1990). That case, in turn, has been cited by another federal appellate court for the same proposition. *See Williams v. Bowman Livestock,* 927 F.2d at 1132.[5] The Pennsylvania Superior Court's decision thus has already added to the increasing disarray of lower court decisions regarding when forum contacts may constitutionally be attributed to a successor. This Court should resolve the conflict and curtail the erosion of an important legal principle by granting certiorari here.

IV. The Pennsylvania Superior Court's Invocation of Public Policy is Ineffective to Override the Due Process Clause.

In support of its decision that it need not base jurisdiction over CPI on CPI's own forum contacts, the Pennsylvania Superior Court cited public policy considerations, specifically, the protection of product liability plaintiffs and the prevention of corporations immunizing themselves from liability by virtue of corporate reorganization. Pet. App. at A-25-26.

CPI does not question that public policy considerations have their place in the evolution of product liability law. Public policy considerations may not, however, override the constitutional protection of the Due Process Clause. Because of public policy considerations underlying the "product line exception" of Pennsylvania's product liability law, CPI might possibly be found

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5. Although *Williams* stated, as a general proposition, that a "corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor," the forum law in that case imposed successor liability only in cases of "statutory merger or consolidation" and other "limited circumstances." 927 F.2d at 1132.

liable for Heyden's torts. But whether CPI is subject to the jurisdiction of the Pennsylvania courts is a separate issue, to be determined not by reference to considerations of product liability law but to the considerations of due process defined by this Court in the unbroken line of cases extending from *International Shoe.*

Finally, CPI is not attempting to immunize itself from liability. CPI simply seeks to defend its "liberty interest in not being subject to the binding judgments of a forum with which [it] has established no meaningful 'contacts, ties, or relations.' " *Burger King,* 471 U.S. at 471-72 (quoting *International Shoe,* 326 U.S. at 319). This Court should grant certiorari here, to protect this important constitutional right.

CONCLUSION

For the foregoing reasons, Chromalloy Pharmaceutical, Inc's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 21, 1991

APPENDIX

Sherrie SIMMERS and Robert A. Simmers, W/H and Robert S. Simmers, a Minor, by His Parents and Natural Guardians, Sherrie Simmers and Robert A. Simmers, W/H

V.

AMERICAN CYANAMID CORPORATION, Tenneco, Inc., Tenneco Resin, Inc., Fellows Medical Manufacturing Company, Inc., Chromalloy American Corporation, Chromalloy Pharmaceutical, Inc., Forrest Pharmaceutical Laboratories, Inc., Heyden Products, Inc., the Children's Hospital of Philadelphia, Radiology Department of the Children's Hospital of Philadelphia, Rovena Spenser, M.D., C.E. Koop, M.D. and Joseph Stokes, Jr., M.D. (Two Cases)

Appeal of TENNECO RESINS, INC. (Two Cases)

Robert J. BOYER, Individually and as Executor of the Estate of Marsha F. Boyer, Deceased

V.

CHILDREN'S HOSPITAL OF PHILADELPHIA, Heyden Products, American Cyanamid Corp., Tenneco, Inc., Tenneco Resin, Inc. (Formerly "Tenneco Chemical Co"), Fellows Medical Manufacturing Co., Inc., Chromalloy Pharmaceutical, Inc., Forrest Pharmaceutical Laboratories, Inc., Chromalloy American Corporation and Eugene B. Spitz, M.D. (Two Cases)

Appeal of CHROMALLOY PHARMACEUTICAL, INC. (Two Cases)

Superior Court of Pennsylvania.

Argued Oct. 25, 1989.
Filed June 12, 1990.

Before MONTEMURO, POPOVICH and CERCONE, JJ.

POPOVICH, Judge:

In this consolidated appeal, we are presented with a question of first impression in Pennsylvania – whether the forum-related contacts and actions of a predecessor corporation may be attributed to its successor for the purposes of establishing in personam jurisdiction.

Herein, appellants, Tenneco Resins, Inc. and Chromalloy Pharmaceutical, Inc., (hereafter "TRI" and "CPI" respectively) challenge the in personam jurisdiction of the Court of Common Pleas of Philadelphia.[1] To appreciate fully the complexity of this case, a thorough recitation of the underlying facts is necessary, including a history of the product Thorotrast and its corporate lineage.

Thorotrast is the pharmaceutical brand name for colloidal thorium dioxide which is a radioactive contrast dye medium used to perform diagnostic x-rays. By the late 1940's and continuing to the present date, scientific literature and FDA regulations concerning the use of thorium dioxide products explained the medical risks of using Thorotrast, especially an increased risk of cancer.[2]

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1. Our review of the lower court's determination has been complicated by the terseness of the court's orders sustaining jurisdiction. The lower court, *without an opinion* espousing the theory/theories serving as the basis of its decisions, found that the Philadelphia Court of Common Pleas could exercise in personam jurisdiction over both appellants. He then entered orders declaring, "the question of In Personam jurisdiction presents a substantial, controlling question of both state and constitutional jurisdictional law, one that is a matter of first impression and which warrants immediate appellate review." We strongly urge the trial court, when faced with future jurisdictional questions, to provide this court with an opinion outlining the factual and legal bases for its decision, rather than simply certifying the issue for appeal. However, rather than remand for explanation of the lower court's decision, we will address the various theories of in personam jurisdiction raised by the plaintiffs-appellees to the extent necessary.

2. See Taft, Editorial: Prium Non Nocere, 51 Radiology 875 (1948); Budin, E. and Gershon-Cohen, J., *The Danger of Cancer from Thorotrast as a Diagnostic Medium,* 75 Am.J. of Roent. 1183 (1956); Council on Pharmacy and Chemistry, Report on Thorotrast,

The genealogy of the Thorotrast product line and its manufacturers is complex and is the single most important factor in resolution of the question of jurisdiction.[3] The commercial use of Thorotrast as an x-ray contrast dye was pioneered by the Von Heyden Company of Germany in the early 1930's. At the same time, Heyden Chemical Corporation, a New York Corporation, began to distribute Thorotrast in the United States, including the Philadelphia area where the drug was administered at defendant Children's Hospital, among other medical facilities.

In 1953, Heyden sold its antibiotics division to American Cyanamid, including all trademarks, patents, goodwill and business relating to Thorotrast. The November 3, 1953 sales agreement, in part, provided:

> [*ARTICLE IV,* A(l)] CYANAMID shall: (1) Duly assume as of the closing provided for herein all obligations of HEYDEN thereafter arising under all licenses, rights, permits, leases, agreements and contracts assigned by HEYDEN to CYANAMID pursuant to this Agreement; provided, however, that with respect to any thereof not identified in the Exhibits attached hereto CYANAMID shall have the option of reassigning the same to HEYDEN, such option to be exercised by notice to HEYDEN within two (2) weeks after an officer of CYANAMID shall have notice thereof.[4]

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99 J.Amer.Med.Assoc. 2183; Looney, William B., et al., *Late Follow-up Studies after Internal Deposition of Radioactive Materials,* 160 J.Amer.Med.Assoc. 1 (1956); 25 C.F.R. § 3.36 (1965); Hoffer, P.B., Introduction: Voices from The Past; *A Brief History of Thorotrast,* 1988 Yearbook of Nuclear Medicine, pp. 13-20 (1988).

3. To aid the reader, included in this opinion as Appendix A is a flow chart outlining the relationships between the various companies which are related in any way to Thorotrast. This chart was originally attached to appellees' brief as Exhibit E.

4. The sales agreement specifically assigned all rights to Thorotrast related patents to American Cyanamid.

> [*ARTICLE V.*, B.] HEYDEN: agrees to indemnify, defend and save CYANAMID and/or their successors and assigns harmless from and against any and all claims of whatsoever nature, including the cost of any litigation thereof, arising out of or in connection with the operation of and conduct by HEYDEN of the business of its Antibiotic Division prior to the closing date hereunder, including, without limitation, claims for infringement of patents, defaults in performance of contract obligations, nuisance claims and claims or liability arising through violation of any law or governmental regulation.

After the sale, Heyden continued in business but no longer made or sold Thorotrast.

In 1954, American Cyanamid sold its Thorotrast product line to Testagar and Company.[5] Appellees allege that as early as 1949, Testagar distributed Heyden's Thorotrast product line. However, the earliest delivery of Thorotrast by Testagar into Pennsylvania documented in the record occurred in 1961.

In 1962, Testagar underwent a statutory consolidation and became part of the Fellows Medical Manufacturing Company. In 1971, Fellows was merged into FMM, Inc., a wholly owned subsidiary of Chromalloy American Corporation. Later the same year, FMM changed its corporate name to Fellows Medical Manufacturing Corporation, Inc., a Delaware Corporation. The Thorotrast product line was passed to each new

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5. In *Bouley v. American Cyanamid Company, et al.*, Slip Opinion, No. 85-4368-Z (D. Mass. Oct. 21, 1987), available at 1987 WESTLAW 18738, Judge Zobel noted that the Cyanamid-Testagar sales agreement contained a hold-harmless clause under which Testagar agreed to indemnify Cyanamid "against any claim for personal injuries, damages or destruction of property . . . arising out of this agreement, the use, handling or inherent characteristics of the materials sold hereunder." *Bouley*, Slip Op. at 10.

corporate entity in succession; each, in turn, manufactured the drug and distributed it to the medical profession, including that of Pennsylvania.

Late in 1973, Chromalloy American incorporated Chromalloy Pharmaceuticals, Inc., appellant CPI. In 1974, CPI became the surviving corporation following a statutory consolidation of numerous Chromalloy American subsidiaries, including Fellows Medical Manufacturing Corporation. While it appears that CPI never manufactured or distributed Thorotrast, CPI, through its O'Neil, Jones and Feldmen Division, had filed a New Drug Application for Thorotrast with the Food and Drug Administration. However, in 1977, CPI withdrew its Thorotrast application. Subsequent thereto, portions of CPI were sold to Forest Laboratories, including the O'Neil, Jones and Feldmen Division which then controlled the Thorotrast line.

Meanwhile, in 1957, Heyden changed its name to Heyden Newport Chemical Corporation. In June of 1963, the Tennessee Gas Transmission Company, commonly known as Tenneco, Inc., acquired all of the assets and liabilities of Heyden Newport by means of a wholly owned subsidiary known as HDN Corporation, a Delaware corporation, created for such purpose. The "Plan of Reorganization," executed by Heyden Newport, Tenneco and HDN, provided: 1) All of Heyden Newport's assets, properties, business and goodwill were to be transferred to HDN in exchange solely for shares of $5.00 par value common stock of Tenneco owned or to be owned by HDN; and 2) Heyden Newport would then dissolve and distribute the Tenneco shares to stockholders of Heyden. In October of 1963, the parties completed the corporate acquisition of Heyden Newport. Heyden Newport then transferred to HDN all of its assets, properties, business and goodwill including the right to use the name Heyden Newport Chemical Corporation for which HDN executed and delivered to Heyden Newport an "Assumption Agreement" under which HDN agreed to pay, perform and discharge, all debts,

obligations, contracts and liabilities of Heyden Newport of any kind, character or description, whether accrued, absolute, contingent or otherwise, and whether or not reflected or reserved against on the financial statements of Heyden Newport. Immediately thereafter, Heyden Newport changed its name to Denport Corporation, underwent voluntary dissolution under Delaware corporate law and distributed the Tenneco shares to its stock holders.

In turn, HDN changed its name to Heyden Newport Chemical Corporation, then to Tenneco Chemicals, Inc., and then again to Tenneco Resins, Inc., appellant TRI. The management of former Heyden Newport was retained as a part of the sales agreement. From the moment of their incorporation, TRI and its predecessors in interest were either qualified to do business as a foreign corporation in Pennsylvania or were carrying on a continuous and systematic part of their business in the Commonwealth until TRI voluntarily surrendered its certificate to do so on June 11, 1984. Thereafter, on August 26, 1985, TRI, pursuant to Delaware law, filed a certificate of dissolution.

The Boyer case is a wrongful death and survival action filed on behalf of the estate of Marsha Boyer and her surviving family. On or about April 19, 1949, Marsha Boyer, then five months old, was administered the drug Thorotrast in Children's Hospital of Philadelphia. She first learned of the presence of Thorotrast in her system in February of 1985. Marsha Boyer died on April 26, 1986, at Broad Street Hospital in Philadelphia from a cancer-related illness which appellees allege was induced by Thorotrast. Throughout her life, Mrs. Boyer was a resident of New Jersey, and, at the time of her death, she resided in Stone Harbor, New Jersey.

The Simmers case is factually similar to the Boyer case. Herein, Sherrie Simmers alleges that as a result of the administration of Thorotrast to her on May 31, 1949, at Children's Hospital of Philadelphia, she currently suffers from numerous serious maladies including, but

not limited to, fibrosis, lymphatic obstruction with secondary lymphedema and an increased risk of contracting cancer of the bone marrow, liver, kidneys and spleen. Sherrie Simmers, who is also a lifetime resident of New Jersey, learned of her Thorotrast problem in 1986. Neither Thorotrast recipient was ever advised of the inherent problems of Thorotrast by any of the defendants below.

[1] Herein, appellants contend that the forum-related actions contacts and actions of a predecessor corporation may not be attributed to its successor in interest; instead jurisdiction must be based on the forum-related activity of the defendant *itself*. We disagree and hold that the predecessor's activities may be attributed to the successor for jurisdictional purposes.[6]

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6. Although appellees raised numerous theories of jurisdiction below, we need only address the inextricably intertwined issues of successor liability and personal jurisdiction. However, for the reader's benefit, we will list the jurisdictional issues as set forth by appellees.

I. The lower court correctly concluded that Pennsylvania has personal jurisdiction over TRI based upon:

A. TRI's formal qualification as a foreign corporation in this Commonwealth between August 18, 1963 and June 11, 1984;

B. TRI's constructive presence in Pennsylvania by virtue of the attribution of its predecessor in interest's (Heyden Newport Chemical Company) contacts with Pennsylvania in general and regarding Thorotrast in particular; and/or

C. TRI's own alleged tortious acts and activities towards Thorotrast victims related to this Commonwealth following its acquisition of Heyden and its specific undertaking to fulfill and perform all of Heyden's obligations and liabilities.

II. The lower Court correctly concluded that Pennsylvania has personal jurisdiction over CPI based upon:

A. CPI's constructive presence in Pennsylvania by virtue of its corporate predecessor's (Testagar and Company) alleged sale and distribution of Thorotrast to Children's hospital;

B. CPI's constructive presence in Pennsylvania by virtue of its predecessor in interest's (Heyden Newport Chemical Company) contacts with Pennsylvania in general and regarding Thorotrast in particular; and/or

C. CPI's own alleged tortious acts and activities toward

Generally, "[j]urisdiction over a nonresident defendant may be based either upon the specific acts of the defendant which gave rise to the cause of action, or upon the defendant's general activity within the forum state." *Skinner v. Flymo, Inc.,* 351 Pa.Super. 234, 239, 505 A.2d 616, 619 (1986) citing, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473 n. 15, 105 S.Ct. 2174, 2182 n. 15, 85 L.Ed.2d 528, 541 n. 15 (1985); *Bork v. Mills,* 458 Pa. 228, 329 A.2d 247 (1974); *Rogers v. Rogers,* 295 Pa.Super. 160, 441 A.2d 398 (1982); *Bianco v. Concepts "100", Inc.,* 291 Pa.Super. 458, 436 A.2d 206 (1981).

When jurisdiction is based upon a foreign corporation's *general activity* or consent, i.e., when the corporation has "continuous and substantial contacts" with Pennsylvania or has voluntarily registered itself to do business here, the courts of this Commonwealth may exercise jurisdiction over the foreign corporation regardless of whether the cause of action being prosecuted is related to the corporation's activities in Pennsylvania. 42 Pa.C.S.A. § 5301.[7] *Bork v. Mills,* 458 Pa. at 230, 329

NOTES *(Continued)*

Thorotrast victims in this Commonwealth subsequent to its acquisition of Heyden's product line.

7. § 5301. Persons

(a) **General rule.**—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

* * * * * *

(2) Corporations.—

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

* * * * * *

(b) Scope of jurisdiction.—When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section.

A.2d at 249; *Skinner v. Flymo, Inc.,* 351 Pa.Super. at 239, 505 A.2d at 619; *Slota v. Moorings, Ltd.,* 343 Pa.Super. 96, 104-108, 494 A.2d 1, 5-6 (1985); *Whalen v. Walt Disney World Co.,* 274 Pa.Super. 246, 250, 418 A.2d 389, 391 (1980); See also: *Burger King Corp. v. Rudzewicz,* 471 U.S. at 473 n. 15, 105 S.Ct. at 2182 n. 15.

Moreover, when a foreign corporation, which was subject to the general personal jurisdiction of Pennsylvania tribunals, subsequently ceases to do continuous and systematic business in Pennsylvania or withdraws its qualifications as a foreign corporation in this Commonwealth, Pennsylvania's jurisdiction over the foreign corporation is not defeated with respect to any act, transaction or omission which occurred during the previous period. 42 Pa.C.S.A. § 5301(b), *supra; Slota v. Moorings, Ltd., supra; Mobay Chemical Corp. v. Air Products, etc.,* 290 Pa.Super. 489, 495, 434 A.2d 1250, 1253 (1981); *Fischman v. Fischman,* 470 F.Supp. 980 (E.D.Pa.1979). Accord, *Burger King Corp. v. Rudzewicz,* 471 U.S. at 473 n. 15, 105 S.Ct. at 2182 n. 15.

When jurisdiction is based upon a foreign corporation's specific act or acts related to the forum, the propriety of exercising jurisidiction over a non-resident is predicated upon the following two considerations: 1) Jurisdiction must be conferred by the Commonwealth's "long-arm" statute, 42 Pa.C.S.A. § 5322[8] and 2) The

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Discontinuance of the acts enumerated in subsection (a)(2)(i) and (iii) . . . shall not affect jurisdiction with respect to any act, transaction or omission during the period such status existed.

8. *§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth.*

(a) General rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative or a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in

exercise of jurisdiction must survive constitutional review under the Due Process Clause of the United States Constitution. *Asahi Metal Industry Co. v. Superior*

NOTES *(Continued)*

this Commonwealth, any of the following shall constitute transacting business for the purposes of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing and object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

* * * * * *

(b) Exercise of full constitutional power over non residents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

* * * * * *

(e) Inconvenient forum.—When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

Court, 480 U.S. 102, 108-109, 107 S.Ct. 1026, 1031-1033, 94 L.Ed.2d 92 (1987); *Burger King Corp. v. Rudzewicz,* 471 U.S. at 470-478, 105 S.Ct. at 2181-2185; *Skinner v. Flymo, Inc.,* 351 Pa.Super. at 239, 505 A.2d at 619; *Hewitt v. Eichelman's Subaru, Inc.,* 341 Pa.Super. 589, 492 A.2d 23 (1985).

The Court, in *Skinner v. Flymo, Inc., supra,* set forth the applicable constitutional guidelines to be employed when determining whether the requirements for specific act jurisdiction have been met as follows:

> . . . Where the forum state seeks to assert specific jurisdiction over an out-of-state defendant, who has not consented to be sued there, the Due Process Clause of the Fourteenth Amendment to the United States Constitution "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz, supra at* 472, 105 S.Ct. at 2182, 85 L.Ed.2d at 540-541 (citation omitted). See: *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 413-414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404, 411 (1984). The critical question in determining whether the defendant has purposefully directed his activities at residents of the forum is not whether it was foreseeable that defendant's activities would have an injurious effect in the forum state, but whether the defendant's conduct and his connection with the forum state were such that he could reasonably anticipate being "haled" into court there. *Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at 474, 105 S.Ct. at 2183, 85 L.Ed.2d at 542; *United Farm Bureau Mutual Insurance Co. v. United States Fidelity and Guaranty Co.,* 501 Pa. 646, 657, 462 A.2d 1300, 1305 (1983), quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 294, 100 S.Ct. 559, 565-566, 62 L.Ed.2d 490, 501 (1980). This question, in turn,

must be resolved by examining the defendant's contacts with the forum state.

> The Due Process Clause permits a state to exercise in personam jurisdiction over a nonresident defendant when there exist "certain minimum contacts" between the defendant, the forum state, and the litigation. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790, 797-798 (1984); *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804, 811 (1984); *Helicopteros Nacionales de Columbia, S.A. v. Hall, supra*, 466 U.S. at 413-414, 104 S.Ct. at 1872, 80 L.Ed.2d at 411; *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945); *Kenny v. Alexson Equipment Co.*, 495 Pa. 107, 117-118, 432 A.2d 974, 980 (1981); *Slota v. Moorings, Ltd., supra*, 343 Pa.Super. at 102-103, 494 A.2d at 3. . . .

Random, fortuitous, or attenuated contacts between the forum state will not support an exercise of jurisdiction. [*Burger King Corp. v. Rudzewicz*, 471 U.S.] at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 542; *Keeton v. Hustler Magazine, Inc., supra*, 465 U.S. at 774, 104 S.Ct. at 1478, 79 L.Ed.2d at 797; *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 299, 100 S.Ct. at 568, 62 L.Ed.2d at 502. Jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* which create a 'substantial connection' with the forum State. *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 475, 105 S.Ct. at 2184, 85 L.Ed.2d at 542 (emphasis in original). See: *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226 (1957). . . .

"Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal

jurisdiction would comport with 'fair play and substantial justice.' " [*Burger King Corp. v. Rudzewicz,* 471 U.S.] at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543. Factors to be considered include " 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' " *Id.* at 477, 105 S.Ct. at 2184, 85 L.Ed.2d at 543, quoting *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 292, 100 S.Ct. at 564, 62 L.Ed.2d at 498.

These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accomplished through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat jurisdiction even if the defendant has purposefully engaged in forum activities.

Burger King Corp. v. Rudzewiez, supra, 471 U.S. at 477-478, 105 S.Ct. at 2184-2185, 85 L.Ed.2d at 543-544 (citations omitted).

Skinner v. Flymo, Inc., 351 Pa.Super. at 240-244, 505 A.2d at 619-621.

In determining whether the lower court properly exercised jurisdiction over the appellants, we must determine whether it is a violation of our long arm statute and the Due Process Clause of the United States Constitution to attribute the forum contacts of a predecessor corporation to its successor for jurisdictional purposes. We believe our long arm statute is not violated and, more importantly, due process is not offended by such a judicial action.

Appellees cite a growing line of cases which hold that, under certain circumstances, a court may exercise jurisdiction over a successor corporation based upon the actions of its predecessor. *Duris v. Erato Shipping,* 684 F.2d 352 (6th Cir.1982), *aff'd sub nom., Pallas Shipping Agency, Ltd. v. Duris,* 461 U.S. 529, 103 S.Ct. 1991, 76 L.Ed.2d 120 (1983); *Bowers v. Neti Technologies,* 690 F.Supp. 349 (E.D.Pa.1988); *Goffe v. Blake,* 605 F.Supp. 1151 (D.Del.1985); *United States v. Bliss,* 108 F.R.D. 127 (E.D.Mo.1985); *Cole v. Caterpillar Machinery Corp.,* 562 F.Supp. 179 (M.D. La.1983); *Fehl v. S.W.C. Corp.,* 433 F.Supp. 939 (D.Del.1977); *Maryland National Bank v. Shaffer Stores Co.,* 240 F.Supp. 777 (D.Md.1965).

In response, appellants argue that this line of cases only applies when a statutory merger is involved, which is *not* the case of either appellant. In support of their argument, appellants cite *Johnston v. Pneumo Corp.,* 652 F.Supp. 1402 (S.D.Miss.1987), *Sullivan v. Fellows Testagar and Company, Inc.,* 518 So.2d 1111 (4th Cir. La.App. 1987) and *Tango v. The Cleveland Clinic Foundation,* No. 95606 Slip Op. (C.C.P., Cuyahoga Co., Ohio April 2, 1986). We decline to follow these cases. As we will discuss *infra,* the great weight of persuasive authority permits imputation of a predecessor's actions upon its successor *whenever* forum law would hold the successor liable for its predecessor's actions, even though the new

corporate entity is not the result of a statutory merger or consolidation.[9]

Appellants further argue that "various theories of liability add nothing to the jurisdictional inquiry." Quoting *Witt v. Scully,* 539 F.2d 950 (3rd. Cir.1976), appellants argue, "The law which must be applied to the issue [of jurisdiction] . . . is not the aggregate of the legal precepts which substantively may impose liability on a defendant. Rather, the applicable legal precepts are jurisdictional ones, wholly statutory in this case. The result turns solely upon whether defendant's conduct brings him within the terms of the Pennsylvania long arm statute." *Witt v. Scully,* 539 F.2d at 951- 952.[10] See also *Chromalloy v. Clair Polishing Company, Inc.,* No. 85-6021, Slip Op. (E.D.Pa., May 21, 1986) available at 1986 WESTLAW 5823.

However, we disagree and quote with approval Judge Caleb M. Wright who stated, "Certain principles of the substantive law with respect to the assumption by successor corporations of products liability are relevant to this jurisdictional question . . . Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business within the state [i.e. assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business." *Fehl v. S.W.C. Corp.,* 433 F.Supp. at 945. Further, Judge Wright stated, "The rationale of the substantive

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9. We note that, generally, the facts of the cases cited by appellee in favor of jurisdiction and relied upon by this court revolve around statutory mergers or consolidation, although the discussion of the issue in each case does not limit itself only to that situation. In *Sullivan v. Fellows Testagar, supra,* the Louisiana Court of Appeals rejected the very argument which we now embrace and found that TRI was not Heyden's successor. We are unpersuaded by the *Sullivan* court's analysis of the facts, and as the discussion *infra* will demonstrate, TRI was by means of a *de facto* merger, the successor to Heyden and liable for Heyden's acts.

10. We note that in *Witt v. Scully, supra,* the Third Circuit was not required to address the issues before us.

liability [successor liability] cases, in Delaware and elsewhere, is *equally applicable* to the problem of personal jurisdiction." *Fehl v. S.W.C. Corp.,* 433 F.Supp. at 947 (emphasis added). In view of the similarity of concerns with respect to jurisdiction and liability, certain analogies between the law of successor liability are useful to determine whether a predecessor corporation and its successor are one and the same for jurisdictional purposes.[11]

The general rule governing successor liability in Pennsylvania is set forth in *Dawejko v. Jorgenson Steel Co.,* 290 Pa.Super. 15, 434 A.2d 106 (1981). Generally, when a company sells or transfers all of its assets to a successor, the successor does *not* acquire the liabilities of the transferor merely because of its succession to the transferor's assets. *Dawejko v. Jorgenson Steel Co.,* 290 Pa.Super. at 18, 434 A.2d at 107. See also *Knapp v. North American Rockwell,* 506 F.2d 361 (3rd Cir. 1974), *cert. denied* 421 U.S. 965, 95 S.Ct. 1955, 44 L.Ed.2d 452 (1975). However, the general rule does not apply and liability attaches to the successor when one of the following is shown:

1) The purchaser expressly or impliedly agrees to assume such obligation;

2) The transaction amounts to a consolidation or merger;

3) The purchasing corporation is merely a continuation of the selling corporation;

4) The transaction is fraudulently entered into to escape liability;

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11. In using *Dawejko v. Jorgenson Steel Co.,* 290 Pa.Super. 15, 434 A.2d 106 (1981), we simply apply by analogy the law of successor liability to that of personal jurisdiction in order to make the preliminary determination of whether, based on the facts as they have been developed at this early stage of litigation, the successor corporations should stand in the shoes of their predecessor/s.

5) The transfer was not made for adequate consideration and provisions were not made for the creditors of the transferor.

6) The successor undertakes to conduct the same manufacturing operation of the transferor's product lines in essentially an unchanged manner. The successor is then strictly liable for injuries caused by defects in the product line, even if previously manufactured and distributed by the transferor.

Dawejko v. Jorgenson Steel Co., 290 Pa. Super. at 18, 23, 434 A.2d at 107, 110. See also *Philadelphia Electric Company v. Hercules, Inc.,* 762 F.2d 303 (3rd Cir.1985) (applying Pennsylvania successor liability law).

Instantly, the plaintiffs have demonstrated that TRI by means of a *de facto* merger had become the corporate embodiment of Heyden. As previously described, Tenneco acquired all of the assets and liabilities of Heyden Newport in 1963. In exchange for Tenneco stock owned by HDN, Heyden transferred all its assets and liabilities to HDN Corporation, a wholly-owned subsidiary of Tenneco created for the purpose of acquiring Heyden Newport. Heyden Newport then changed its name to Denport Corporation and dissolved, immediately distributing its Tenneco shares to the former Heyden shareholders. In turn, HDN changed its name to Heyden Newport Chemical Corporation, then to Tenneco Chemicals and eventually to TRI. The fact that a *de facto* merger occurred is particularly evident when we consider that after the transaction between Tenneco and Heyden Newport, the new corporation transacted business under its former name for a period of time, all of Heyden Newport's corporate officers were retained by the new entity and the sales agreement provided Heyden Newport had to dissolve itself and distribute its Tenneco stock. See *Elmer v. Tenneco Resins, Inc.,* 698 F.Supp. 535 (D.Del.1988) ("the Court finds that there is a question whether HDN impliedly assumed any Thorotrast liability of Heyden . . . It could reasonable be inferred . . . , that HDN agreed to assume any and all

liabilities of Heyden . . ."); *Gee v. Tenneco, Inc.,* 615 F.2d 857, 863 (9th Cir.1980) (Tenneco documents are reasonably susceptible to conflicting interpretations and whether HDN assumed Thorotrast liabilities of Heyden is a question of fact).

In *Gee v. Tenneco, Inc.,* 615 F.2d at 864, the Ninth Circuit, citing dicta from the California case of *Ray v. Alad Corp.,* 19 Cal.3d 22, 560 P.2d 3, 136 Cal.Rptr. 574 (1977), stated "it would appear that the [Heyden-Tenneco] transaction falls within the *de facto* merger doctrine." However, the Court, bound by its standard of review, refused to overturn summary judgment on this issue because it was not absolutely certain that the dicta in *Ray v. Alad Corp., supra,* concerning the *de facto* merger doctrine was the law of California. We need not hypothesize about Pennsylvania law regarding *de facto* merger; successor liability is imposed when the consideration for the purchase of assets consists wholly of shares of the purchaser's stock which are then promptly distributed to the seller's shareholders in conjunction with seller's liquidation. *Shannon v. Samuel Langston Company,* 379 F.Supp. 797, 801 (W.D. Mich.1974). See also *Philadelphia Electric Company v. Hercules, Inc.,* 762 F.2d 303 (3rd Cir.1985); *Martin v. Johns-Manville Corp.,* 322 Pa.Super. 348, 371, 469 A.2d 655, 667 (1983).[12] This is exactly what happened *sub judice.*

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12. In *Martin v. Johns-Manville, supra,* we stated, "We believe, however, that in some circumstances a successor should be held accountable for the recklessness of its predecessor. This will be so when the goals that underlie the imposition of punitive damages – punishment and deterrence – will be advanced. In this regard, we may draw from the various formulations of the rule permitting the imposition of successor liability when the successor is a mere "continuation" of its predecessor." Citing *Shannon v. Samuel Langston Co., supra.*

Similarly, we find that CPI is subject to the jurisdiction of Pennsylvania courts. In 1954, Testagar purchased the Thorotrast product line from American Cyanamid and manufactured and distributed Thorotrast in Pennsylvania in an essentially unchanged manner from that of Heyden. When Testagar purchased the Thorotrast product line from American Cyanamid, it expressly agreed to assume Thorotrast related liabilities. CPI is, through a series of statutory consolidations and mergers, the current corporate embodiment of Testagar. The foregoing analysis demonstrates that Testagar was liable as the successor in interest to Heyden and American Cyanamid for Thorotrast related liabilities pursuant to the "product line exception". *Dawejko v. Jorgenson Steel Co., supra.* It then follows that CPI, as the corporate embodiment of Testagar by means of statutory mergers and consolidations, is responsible for Testagar liabilities resulting from its continuation of Heyden's Thorotrast product line. Cf., *Husak v. Berkel Inc.,* 234 Pa.Super. 452, 341 A.2d 174 (1975).

Having determined that both TRI and CPI are essentially the corporate embodiments of their predecessors (ultimately, Heyden) and, for the purposes of jurisdiction, liable for their predecessors' acts, we turn to the question of whether due process is offended by subjecting a successor corporation to personal jurisdiction based on the forum related activity of its predecessor.[13] As the following will explain, due process is not offended by subjecting TRI and CPI to personal jurisdiction in the Commonwealth of Pennsylvania.

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13. Pennsylvania's jurisdictional statutes are co-extensive with the Due Process Clause. *Gulentz v. Fosdick,* 320 Pa.Super. 38, 466 A.2d 1049 (1983), appeal after remand 355 Pa.Super. 302, 513 A.2d 440, appeal denied 515 Pa. 580, 583, 527 A.2d 541, 543; 42 Pa.C.S.A. §5308 ("The tribunals of this Commonwealth may exercise jurisdiction under this subchapter only where the contact with this Commonwealth is sufficient under the Constitution of the United States."); 42 Pa.C.S.A. §5322(b).

In *Duris v. Erato Shipping,* 684 F.2d 352 (6th Cir.1982), *aff'd sub nom., Pallas Shipping Agency, Ltd. v. Duris,* 461 U.S. 529, 103 S.Ct. 1991, 76 L.Ed.2d 120 (1983),[14] the Sixth Circuit found that, although the surviving corporation to a merger had never transacted business in Ohio, its constituent corporation had. It further found that under Ohio law, the surviving corporation was liable for all claims against the constituent corporation. *Id.,* at 356. Therefore, the Court concluded that the plaintiff could gain personal jurisdiction over the surviving corporation merely by establishing Ohio contacts sufficient to exercise jurisdiction over the constituent corporation. To quote the *Duris* court, "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles." Id., at 356.

In *Goffe v. Blake,* 605 F.Supp. 1151 (D.Del, 1985), the district court held that the action and conduct of a constituent corporation could be attributed to its successor following a merger for the purpose of determining the successor's amenability to personal jurisdiction for the liability of its predecessor. After so ruling, the court applied the District of Columbia long arm statute and the Due Process Clause to the predecessor corporation. Finding, personal jurisdiction was properly over the predecessor, it logically followed that the successor was amenable to personal jurisdiction in the same location. *Id.,* at 1154-1156 (analysis and holding). *Cf., Bowers v. Neti Technologies,* 690 F.Supp. 349, 361 (E.D. Pa.1988) (If NHF is not subject to personal jurisdiction for its liabilities as successor corporation, corporations will be encouraged to immunize themselves by fleeing the jurisdiction and formalistically changing their names – a result clearly not supported by the Pennsylvania jurisdictional statute, citing 42

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14. We note that the issue now before us which was decided by the 6th Circuit Court of Appeals was not presented to the Supreme Court of the United States.

Pa.C.S.A. §5301(b)); *United States v. Bliss,* 108 F.R.D. 127, (E.D.Mo.1985) (As foreign successor to corporation which acquired Missouri corporation and its liabilities, nonresident corporation was subject to jurisdiction under Missouri long arm statute).

Similarly, in *Cole v. Caterpillar Machinery Corp.,* 562 F.Supp. 179 (M.D.La.1983), the court held that where a successor corporation to a merger had no contacts with the forum, it could still be subjected to in personam jurisdiction without offending due process requirements since plaintiff's claim arose against its predecessor and that the corporation once had significant contacts with the forum. The court specifically noted that as a result of the merger, the successor had assumed both the liabilities and the assets of its predecessor. Further, the court stated, "Since Americas [successor] could have availed itself of the benefits of the forum in order to sue for monies owed its corporate predecessor, it seems only fair that Americas, deriving benefits from the forum should also be expected to answer for liabilities incurred by the alleged negligent actions of its predecessor." *Id.,* at 180-181.

As previously noted, Judge Wright in *Fehl v. S.W.C. Corp., supra,* held that under Delaware law, personal jurisdiction may be assumed over a successor corporation on the basis of the acts of its predecessor in cases where a merger or continuation has preserved the corporate entity. *Fehl,* 433 F.Supp. at 947. Therein, the issue presented was whether a successor corporation could be subject to personal jurisdiction on the basis of actions taken by a predecessor corporation where the predecessor had sold the successor all the assets relating to a specific line of business rather than merged into the successor. Judge Wright determined that the plaintiff had not met its burden of demonstrating that the successor-defendant had absorbed its predecessor through merger or reorganization, and, consequently,

the successor liability theory of jurisdiction failed. However, we reiterate that in Pennsylvania, successor liability has been expanded to include liability based on continuation of a predecessor's product line. *Dawejko v. Jorgenson Steel Co., supra.* Thus, it is the opinion of this court that if current Pennsylvania successor liability law was applied to the facts presented to the *Fehl* court, the result would mirror the result we reach today with respect to appellant CPI. With respect to appellant TRI, the decision in *Fehl v. S.W.C. Corp., supra,* as it was decided thirteen years ago, continues to support our decision today.

Likewise, in *Maryland National Bank v. Shaffer Stores Co.,* 240 F.Supp. 777, (D.Md.1965), the district court held that personal jurisdiction could be asserted pursuant to the Maryland long arm statute over the surviving corporation to a merger without violating the Due Process Clause. In so ruling, the court specifically *rejected* the defendant's argument that since its sole contact with Maryland was as the successor, by several corporate mergers, to an obligor to a contract entered into in Maryland, it would be a violation of due process to subject it to suit in Maryland. *Id.,* at 779.

In addition, the Court of Appeals of the State of Michigan, in *Wiles v. B.E. Wallace Products Corp.,* 25 Mich.App. 300, 181 N.W.2d 323 (1970), held that a foreign corporation, as the alleged successor in interest to the sole proprietorship which had manufactured and sold the gantry that collapsed with resultant injury to plaintiff, could be subjected to jurisdiction under long arm statute based on its predecessors contact with the state if plaintiff could prove his allegations of fact. Thus, the question of jurisdiction over the foreign successor corporation was erroneously disposed of summarily by the trial court.[15]

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15. The Michigan decision is especially significant as our own general jurisdiction statute, 42 Pa.C.S.A. §5301, was patterned after Michigan statutes, 27A.701, .711, .721 and .731. 42 Pa.C.S.A. §5301, Historical note.

However, we emphasize that the acts of a predecessor will not be attributed to its successor when the transaction between the two amounts only to a sale of assets for adequate consideration. *Harris v. Newmand Machine Company, Inc.*, 641 F.Supp. 146 (S.D.Miss. 1986) (Due Process Clause did not permit subjecting foreign corporation which merged with manufacturer to jurisdiction in Mississippi where corporation's only contact with Mississippi was purchase of the assets of predecessor which had sold equipment in forum, and after that time, had no contacts with the forum). See also *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir.1988) (corporate defendant's predecessor's forum contacts would not be attributed to defendant for purposes of jurisdiction, where defendant's predecessor purchased assets from an individual but did not assume any liabilities). This is consistent with our holding today since under Pennsylvania law the general rule of successor liability remains that when a company sells its assets to a successor, the successor does not acquire the liabilities of the transferor merely because of its succession to the transferor's assets. *Knapp v. North American Rockwell, supra; Philadelphia Electric v. Hercules, supra; Dawejko v. Jorgenson Steel Co., supra.* Accordingly, if a successor does not assume either voluntarily or by operation of law the liabilities of its predecessor, then the acts of its predecessor may not be attributed to the successor when answering the question of jurisdiction.

Instantly, it is without question that Heyden could have been subjected to general jurisdiction pursuant to 42 Pa.C.S.A. §5301(a)(2)(iii) and (b), *supra,* for causes of action relating to its Thorotrast product line. Moreover, the same facts could have served as the basis for specific act jurisdiction pursuant to Pennsylvania's long arm statute, 42 Pa.C.S.A. §5322(a)(1), (a)(3), (b). At the time when Mrs. Boyer and Mrs. Simmer were administered Thorotrast at Children's Hospital of Philadelphia, Heyden was the *sole* manufacturer of Thorotrast in the

United States, and Heyden distributed Thorotrast in the Commonwealth of Pennsylvania. Certainly, the Due Process Clause is satisfied as Heyden "purposefully directed" its product Thorotrast at Pennsylvania residents, and the litigation arises directly from the manufacturer and distribution of the drug. *Burger King Corp. v. Rudzewicz,* 471 U.S. at 473-474, 105 S.Ct. at 2182-2183; *Skinner v. Flymo,* 351 Pa. Super. at 242-244, 505 A.2d at 621. Since sufficient "minimum contacts" exist between Heyden and Pennsylvania and those contacts relate directly to the causes of action before us, jurisdiction over TRI was properly exercised by the court below. Likewise, CPI, as successor to Testagar and Heyden, is subject to the personal jurisdiction of Pennsylvania courts, since sufficient "minimum contacts" exist between the subject matter of the litigation, Heyden and the Commonwealth of Pennsylvania.[16] For a similar result see *Bouley v. American Cyanamid Company, supra* (personal jurisdiction over TRI retained).

In holding that the forum-related contacts of a predecessor corporation may be attributed to its successor for jurisdictional purposes when the successor has assumed its predecessor's liabilities, we recognize the realities of modern corporate law and the ever increasing frequency of corporate reorganizations. Plaintiffs must be permitted to establish jurisdiction over a successor corporation based upon its predecessor's contacts with the forum. Otherwise, a corporation which voluntarily or by the operation of law assumes its predecessor's liabilities may be able to avoid the jurisdiction of the very

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16. This is not to say that TRI and CPI ultimately will be liable for appellees' injuries. If Heyden is found liable, then it must be determined who assumed this liability. Among numerous other substantive issues, there are disputes as to the provisions of the Heyden-Tenneco and Heyden-American Cyanamid contracts concerning assumption of liability for Thorotrast related injuries when the administration of the drug occurred before the sale of Thorotrast to American Cyanamid but the personal injury suit was not filed until well after the sale.

forum where the liability accrued simply because it never did business within that forum. This result would be absurd especially when the assets purchased by the successor, at least in part, were derived from the forum and the successor no doubt had knowledge of its predecessor's presence within the forum. Moreover, our holding today recognizes, from a public policy perspective, the nature of products liability actions and their relation to corporate reorganizations. Again, we quote Judge Wright:

> The fact that the predecessor corporation may continue to possess substantial assets may afford protection to the ordinary contract creditors, whose claims are ascertainable at the time of the transfer. It does not necessarily protect products liability plaintiffs, since their claims are contingent and may not arise until long after the corporation is dissolved and its remaining assets distributed . . . See, Note, "Assumption of Products Liability in Corporate Acquisitions", 55 Boston Law Review 86.

Fehl v. S.W.C. Corp, 433 F.Supp. at 946, n. 10.

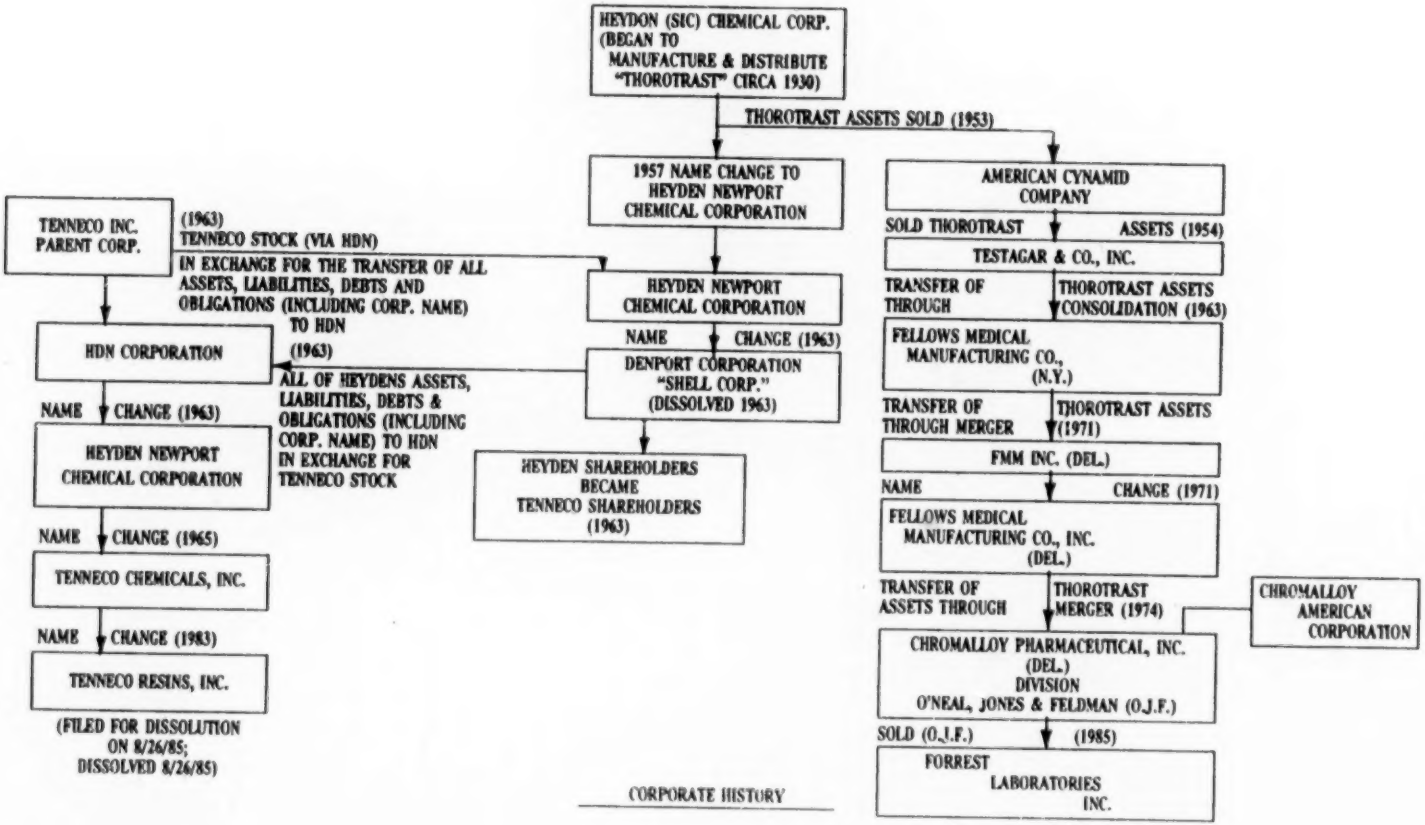
When a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect consents to be held liable in the same locations where its predecessor would have been exposed, i.e. consents to the same jurisdictional qualities of its predecessor. The provisions of the Due Process Clause are not violated by imputing the predecessor's actions and forum contacts upon its successor. As stated in *Burger King v. Rudzewicz,* 471 U.S. at 474, 105 S.Ct. at 2183, the critical question is whether "the defendant's conduct and his connection with the forum state are such that he could reasonably anticipate being haled into court there." No doubt in today's sophisticated world of corporate takeovers, a corporation, which assumes another's liabilities or purchases another's product line, seriously considers the possible extent of any liabilitities and where those

liabilities may exist. We are convinced that the traditional notions of "fair play and substantial justice" central to the assertion of jurisdiction are in fact furthered by today's decision.

In sum, we reiterate that successor corporations must be prepared to answer for the acts of their predecessors. A successor which through a merger, consolidation or *de facto* merger is the corporate embodiment of its predecessor must not be permitted to immunize itself in a specific jurisdiction from the liabilities of its predecessor. Likewise, a successor company which purchases and manufactures a predecessor's product line cannot avoid the jurisdiction of those forums wherein the product was previously manufactured and distributed. In Pennsylvania, it is now the law that when the successor is subject to the liabilities of its predecessor, the acts of a predecessor corporation may be attributed to its successor for the purposes of determining whether jurisdiction is proper.

Orders affirmed. Cases remanded for further proceedings. Jurisdiction is relinquished.

APPENDIX A


HEYDON (SIC) CHEMICAL CORP. (BEGAN TO MANUFACTURE & DISTRIBUTE "THOROTRAST" CIRCA 1930)
THOROTRAST ASSETS SOLD (1953)
1957 NAME CHANGE TO HEYDEN NEWPORT CHEMICAL CORPORATION
AMERICAN CYNAMID COMPANY
SOLD THOROTRAST ASSETS (1954)
TESTAGAR & CO., INC.
TRANSFER OF THROUGH
THOROTRAST ASSETS CONSOLIDATION (1963)
FELLOWS MEDICAL MANUFACTURING CO., (N.Y.)
TRANSFER OF THROUGH MERGER
THOROTRAST ASSETS (1971)
FMM INC. (DEL.)
NAME CHANGE (1971)
FELLOWS MEDICAL MANUFACTURING CO., INC. (DEL.)
TRANSFER OF ASSETS THROUGH
THOROTRAST MERGER (1974)
CHROMALLOY AMERICAN CORPORATION
CHROMALLOY PHARMACEUTICAL, INC. (DEL.) DIVISION O'NEAL, JONES & FELDMAN (O.J.F.)
SOLD (O.J.F.) (1985)
FORREST LABORATORIES INC.
TENNECO INC. PARENT CORP.
(1963) TENNECO STOCK (VIA HDN) IN EXCHANGE FOR THE TRANSFER OF ALL ASSETS, LIABILITIES, DEBTS AND OBLIGATIONS (INCLUDING CORP. NAME) TO HDN
HEYDEN NEWPORT CHEMICAL CORPORATION
NAME CHANGE (1963)
DENPORT CORPORATION "SHELL CORP." (DISSOLVED 1963)
(1963) ALL OF HEYDENS ASSETS, LIABILITIES, DEBTS & OBLIGATIONS (INCLUDING CORP. NAME) TO HDN IN EXCHANGE FOR TENNECO STOCK
HDN CORPORATION
NAME CHANGE (1963)
HEYDEN NEWPORT CHEMICAL CORPORATION
NAME CHANGE (1965)
TENNECO CHEMICALS, INC.
NAME CHANGE (1983)
TENNECO RESINS, INC.
(FILED FOR DISSOLUTION ON 8/26/85; DISSOLVED 8/26/85)
HEYDEN SHAREHOLDERS BECAME TENNECO SHAREHOLDERS (1963)

CORPORATE HISTORY

SHERRIE SIMMERS,
ET VIR., ETC.

V.

AMERICAN CYANAMID CORP., ET AL. — NOS, 3433 & 3565 PHILA. 1988

ROBERT J. BOYER, ETC.

V.

CHILDREN'S HOSPITAL OF PHILA., ET AL. — NOS. 3434 & 3566 PHILA. 1988

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby AFFIRMED. CASES REMANDED FOR FURTHER PROCEEDINGS. JURISDICTION RELINQUISHED.

BY THE COURT:

Prothonotary

Dated: June 12, 1990

IN THE
SUPREME COURT OF PENNSYLVANIA

---

648 E.D. ALLOCATOR DOCKET 1990

ROBERT J. BOYER, individually and as Executor of the Estate of MARSHA F. BOYER, deceased

Respondent

SHERRIE SIMMERS AND ROBERT A. SIMMERS, W/H and ROBERT S. SIMMERS, A Minor, by His Parents and Natural Guardians, SHERRIE SIMMERS AND ROBERT A. SIMMERS, W/H

Respondent

v.

CHILDREN'S HOSPITAL OF PHILADELPHIA, HEYDEN PRODUCTS, AMERICAN CYANAMID COMPANY, TENNECO, INC., TENNECO RESINS, INC., (formerly "TENNECO CHEMICAL CO."), FELLOWS MEDICAL MANUFACTURING CO., INC., CHROMALLOY PHARMACEUTICAL, INC., FORREST PHARMACEUTICAL LABORATORIES, INC., CHROMALLOY AMERICAN CORPORATION AND EUGENE B. SPITZ, M.D., ADDITIONAL DEFENDANT

AMERICAN CYANAMID COMPANY, TENNECO, INC., TENNECO RESINS, INC., FELLOWS MEDICAL MANUFACTURING COMPANY, INC., CHROMALLOY AMERICAN CORPORATION, CHROMALLOY PHARMACEUTICAL, INC., FORREST PHARMACEUTICAL LABORATORIES, INC., HEYDEN PRODUCTS, INC., THE CHILDRENS HOSPITAL OF PHILADELPHIA, RADIOLOGY DEPT. OF CHILDREN'S HOSPITAL OF PHILADELPHIA, ROVENA SPENCER, M.D., C.E. KOOP, M.D., JOSEPH STOKES, JR., M.D.

PETITION OF CHROMALLOY PHARMACEUTICAL, INC. FOR ALLOWANCE OF APPEAL

Petition For Allowance of Appeal From Order of the Superior Court of Pennsylvania, at Nos. 3565 and 3566; Affirming the October 18, 1988 Orders of the Court of Common Pleas of Philadelphia County, at Nos. 1135 and 26

WILLIAM A. JONES, Esquire
JOSEPH B. MAYERS, Esquire
SHERR, JOFFE & ZUCKERMAN, P.C.
I.D. #23750 & #40731
Suite 400
200 Four Falls Corporate Center
P.O. Box 800
West Conshohocken, PA 19428-0800
(215) 941-5400
Attorneys for Petitioner

February 22, 1991

PER CURIAM:

Petition denied.

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
2044 ROBERT N. C. NIX, SR. FEDERAL BUILDING
NINTH AND CHESTNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19107

AVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY

PHILADELPHIA OFFICE
(215) 560-5800

BEATRICE CURTISS
DEPUTY PROTHONTARY

April 3, 1989

Norbert F. Berghoitz, Esq.
3400 Centre Square West
1500 Market Street
Phila., Penna. 19102

William A. Jones, Esq.
601 DeKalb Street
P.O. Box 1180
Norristown, Penna. 19404

Re: Sherrie Simmers, et vir., et al. v. American Cyanamid Corp., et al.
Robert J. Boyer, Indiv., etc. v. Children's Hospital of Phila., et al.
Nos. 3433, 3434, 3565, 3566
PHILADELPHIA 1988

Dear Sirs:

Pursuant to the Stipulation filed with this office, the above-captioned matters have been consolidated of record.

Very truly yours,

Beatrice Curtiss
DEPUTY PROTHONOTARY

BC:rk
cc: ALL INTERESTED COUNSEL

COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHERRIE SIMMERS and ROBERT A. SIMMERS, H/W, et al.	:	JUNE TERM, 1987
vs.	:	
AMERICAN CYANAMID CORPORATION, et al.	:	NO. 26

ORDER

AND NOW, this 18th day of October, 1988, it is hereby ORDERED that Chromalloy Pharmaceutical, Inc.'s Preliminary Objections regarding the question of In Personam jurisdiction presents a substantial, controlling question of both state and constitutional jurisdictional law, one that is a matter of first impression and which warrants immediate appellate review.

BY THE COURT:

D'Alessandro

D'ALESSANDRO, J.

SHERR AND ZUCKERMAN, P.C.
BY: WILLIAM A. JONES, ESQUIRE
IDENTIFICATION NO. 23750
601 DE KALB STREET
P.O. BOX 1180
NORRISTOWN, PENNSYLVANIA 19404
(215) 279-5300

ATTORNEY FOR DEFENDANT, Chromalloy Pharmaceutical, Inc.

ROBERT J. BOYER, Individually and as Executor of the Estate of MARSHA F. BOYER, Deceased

vs.

CHILDREN'S HOSPITAL OF PHILADELPHIA; HEYDEN PRODUCTS; AMERICAN CYANAMID CORP.; TENNECO, INC.; TENNECO RESIN, INC. (formerly "TENNECO CHEMICAL CO."); FELLOW MEDICAL MANUFACTURING CO., INC.; CHROMALLOY PHARMACEUTICAL, INC.; FORREST PHARMACEUTICAL LABORATORIES, INC.; CHROMALLOY AMERICAN CORPORATION

PHILADELPHIA COUNTY

COURT OF COMMON PLEAS DIVISION

FEBRUARY TERM, 1987

No. 1135

ORDER

AND NOW, this 18th day of October, 1988, it is hereby ORDERED and DECREED that

Chromalloy Pharmaceutical, Inc.'s Preliminary Objections present a substantial issue of jurisdiction, and the ultimate determination of this case would be served by an immediate appeal.

BY THE COURT:

D'Alessandro

D'ALESSANDRO, J.

11-1807

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHERRIE SIMMERS and ROBERT A. SIMMERS, H/W, et al.	:	JUNE TERM, 1987
vs.	:	
AMERICAN CYANAMID CORPORATION, et al.	:	NO. 26

ORDER

AND NOW, this 18th day of October, 1988, upon consideration of the Preliminary Objections of Defendant Chromalloy Pharmaceutical, Inc., the Answer of Plaintiff, all supporting memoranda and oral arguments heard thereon, it is hereby ORDERED that Defendant Chromalloy Pharmaceutical, Inc.'s Preliminary Objections in the nature of a Petition challenging In Personam jurisdiction is DENIED.

It is FURTHER ORDERED that Plaintiff's claims based on industry-wide, enterprise, alternative and/or market share theories of liability are hereby dismissed with prejudice.

It is FURTHER ORDERED that paragraph 46(m), (n), and (q) of Plaintiff's Complaint be stricken for lack of conformity to law, without prejudice to file an amended more specific pleading.

BY THE COURT:

D'Alessandro

D'ALESSANDRO, J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ROBERT J. BOYER, Individually as Executor of the Estate of MARSHA F. BOYER, Deceased	:	87-02-1135
vs.	:	
CHILDREN'S HOSPITAL OF PHILADELPHIA, et al.	:	

ORDER

AND NOW, this 23rd day of November, 1987, upon consideration of the several Preliminary Objections by Defendants, Tenneco, Inc., Tenneco Resins, Inc., American Cyanamid, Inc., Chromalloy American Corporation, Chromalloy Pharmaceutical, Inc. and Children's Hospital of Philadelphia, and the Answer of Plaintiff thereto; and the Court having considered the memoranda of all parties, it is hereby ORDERED as follows:

1. Defendants' motions to strike off the Complaint's prayer for punitive damages under the Plaintiff's Wrongful Death Action count is granted. This ruling, however, does not affect nor dismiss Plaintiff's claim for punitive damages under the Survival Act.

2. All of the remaining Preliminary Objections are hereby overruled and denied. Pa. R.C.P. 1026(c) states:

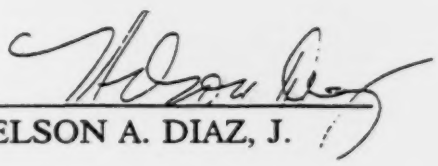
> (c) An action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in

any county in which the venue may be laid against any one of the defendants under the general rules of subdivisions (a) or (b).

Venue is proper in Philadelphia against all Defendants.

3. All Defendants shall plead over within twenty (20) days of the date of this Order.

BY THE COURT:



NELSON A. DIAZ, J.

42 Pa. Cons. Stat. Ann. § 5301 (1981 & Supp. 1990):

§ 5301. Persons

(a) **General rule.** — The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

(1) Individuals. —

(i) Presence in this Commonwealth at the time when process is served.

(ii) Domicile in this Commonwealth at the time when process is served.

(iii) Consent, to the extent authorized by the consent.

(2) Corporations. —

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

(3) Partnerships, limited partnerships, partnership associations, professional associations, unincorporated associations and similar entities. —

(i) Formation under or qualification as a foreign entity under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

(b) **Scope of jurisdiction.** – When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section. Discontinuance of the acts enumerated in subsection (a)(2)(i) and (iii) and (3)(i) and (iii) shall not affect jurisdiction with respect to any act, transaction or omission occurring during the period such status existed.

42 Pa. Cons. Stat. Ann. § 5322 (1981):

§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) **General rule.** – A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by any agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing

an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(5) Having an interest in, using, or possessing real property in this Commonwealth.

(6) (i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

(ii) Being a person who controls, or who is a director, officer, employee or agent of a person who controls, an insurance company incorporated in this Commonwealth or an alien insurer domiciled in this Commonwealth.

(iii) Engaging in conduct described in section 504 of the act of May 17, 1921 (P.L. 789, No. 285), known as "The Insurance Department Act of 1921."[1]

---

1. 40 P.S. § 221.4.

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.

(ii) Guardian of a minor or incompetent.

(iii) Trustee or other fiduciary.

(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).

(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute, home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) **Exercise of full constitutional power over non residents.** — In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the constitution of the United States.

(c) **Scope of Jurisdiction.** — When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

(d) **Service outside this Commonwealth.** – When the exercise of personal jurisdiction is authorized by this section, service of process may be made outside this Commonwealth.

(e) **Inconvenient forum.** – When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

(2)

No. 90-1795

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1990

CHROMALLOY PHARMACEUTICAL, INC.

Petitioner,

v.

ROBERT J. BOYER, individually and as Executor of the ESTATE OF MARSHA F. BOYER, deceased

Respondent.

Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause permit the forum-related contacts of a predecessor corporation to be attributed to its non-resident successor corporation for the purposes of establishing *in personam* jurisdiction where:

1. the successor derived financial benefit from its predecessor's forum related activity;

2. the cause of action arises from the forum related activity of the predecessor;

3. the liability for the injury caused by the predecessor's forum related activity has been voluntarily assumed by the successor;

4. the successor knew or should have known that the predecessor's injury producing activity occurred in the forum state; and

5. the predecessor and successor knew or should have known of the dangers associated with the forum-related activity.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioner Chromalloy Pharmaceutical, Inc. and the respondents Robert J. Boyer, Sherrie Simmers, Robert A. Simmers, Robert S. Simmers (a minor by his parents and natural guardians Sherrie and Robert Simmers), Children's Hospital of Philadelphia, American Cyanamid Company, Tennessee Gas Pipeline Company (formally known as Tenneco, Inc.), Tenneco Resins, Inc., Forrest Pharmaceutical Laboratories, Inc., Chromalloy American Corporation, Eugene B. Spitz, M.D., C. Everett Koop, M.D., Heyden Products Inc., Fellows Medical Manufacturing Company, Inc., Radiology Dept. of Childrens Hospital of Philadelphia, Rovena Spencer, M.D., and Joseph Stokes, Jr., M.D.

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Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert J. Boyer ("Boyer") respectfully opposes Petitioner's writ of certiorari to review the judgment of the Superior Court of Pennsylvania entered June 12, 1990.

OPINIONS BELOW

The opinion of the Pennsylvania Superior Court is reported at 394 Pa. Super. 464, 576 A.2d 376 (1990) and is reprinted in Petitioner's Appendix ("Pet. App.") at A-1. The order of the Supreme Court of Pennsylvania denying

the petition for allocatur is reprinted at Pet. App. A-29-30. The order of the Pennsylvania Court of Common Pleas denying Petitioner's challenge to jurisdiction and certifying this issue for appeal is reprinted at Pet. App. A-33 and Pet. App. A-35 respectively.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the United States Constitution involved are the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV §1, and are set forth in Petitioner's Brief at p. 2.

The Pennsylvania Statutes involved, 42 Pa. Cons. Stat. Ann. §§5301 and 5322, are set forth at Pet. App. A-37-38 and Pet. App. A-38-41.

STATEMENT OF THE CASE

Respondent, Robert J. Boyer, individually and as Executor of the Estate of Marsha F. Boyer, deceased, filed this wrongful death and survival action against Petitioner Chromalloy Pharmaceutical Inc., among other defendants. The action arises from the 1949 administration of a highly dangerous x-ray contrast medium, Thorotrast, to

his wife, Marsha F. Boyer. Marsha Boyer died on April 26, 1986 from a cancer related illness caused by the 1949 Thorotrast injection.

Respondent hereby adopts the recitation and application of facts set forth in the Pennsylvania Superior Court opinion, *Simmers v. American Cyanamid Co., et al.* Pet. App. at A-1-27. Petitioner inaccurately represents to this Court that the Pennsylvania Superior Court allowed the exercise of personal jurisdiction over it "on the basis of the two determinations" (the possibility of liability and the contacts of Petitioner's product line predecessors); therefore, Respondent raises the following points relevant to the constitutional issue presented.

First, the Pennsylvania Superior Court specifically found that, by the late 1940s, scientific literature warned of the medical risk to humans inherent in the use of Thorotrast, specifically warning of the increased risk of cancer; and, that Petitioner, and Petitioner's product line predecessors knew or should have known of the dangers. Pet. App. at A-2-3, A-19, A-25-26.

Furthermore, the Superior Court found that Petitioner derived financial benefit from its product line predecessor corporation's Thorotrast related commercial activity in the forum state; and, that Petitioner and Petitioner's corporate predecessor, Testagar, had voluntarily assumed the product line liabilities. Pet. App. at A-25, A-19.

Finally, the Superior Court found that the due process analysis relevant to the issue of personal jurisdiction, and the requisite determination of fairness, cannot operate in a vacuum divorced from the law of successor

liability because the result would be absurd under the facts of this case. Pet. App. A-11-16, A-25.

REASONS FOR DENYING WRIT

A writ of certiorari should be denied because the Pennsylvania Superior Court's decision regarding the assertion of personal jurisdiction over a non-resident corporate successor defendant is in accordance with the fundamental requirements of due process as set forth by this Court. A writ of certiorari should be denied, as well, because no conflict among the Federal Circuit Courts of Appeals exists with reference to the issue presented and because of the unique factual posture of this matter.

I. The Pennsylvania Superior Court Decision Allowing the Exercise of Personal Jurisdiction Over Petitioner is in Accordance with the Fundamental Requirements of Due Process as Set Forth by this Court.

Petitioner asks this Court to review the decision below because the Pennsylvania Superior Court did not perform its jurisdictional analysis in a vacuum. Indeed, the Superior Court acknowledged the analytic similarity between substantive liability and personal jurisdiction with reference to successor corporations. The Superior Court did not, as Petitioner suggests, focus *entirely* on the contacts of Petitioner's product line predecessors. Rather, the Superior Court focused upon the due process requirement of fairness to the non-resident corporation, finding certain analogies between the law of jurisdiction and the

law of successor liability useful to determine whether the exercise of personal jurisdictional over a non-resident successor corporation comports with the fundamental requirements of due process. The Superior Court quoted with approval Judge Caleb Wright's opinion in *Fehl v. SWC Corp.*, 433 F.Supp 939, 945 (D. Del. 1977), which states:

> Certain principles of the substantive law with respect to the assumption by successor corporations of products liability are relevant to this jurisdictional question. . . . Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business within the state [i.e. assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business. . . . The rationale of the substantive liability cases . . . is *equally applicable* to the problem of personal jurisdiction.

Pet. App. at A-15. [citations omitted, emphasis in original]

Crucial to the Superior Court's decision was the fact that Petitioner enjoyed the financial benefits of its product line predecessor's presence in the forum, the fact that the liabilities relating to the product were voluntarily assumed, and the fact that Petitioner knew or should have known the possible extent of any liabilities flowing from the product line and where those liabilities may exist. The Superior Court concluded that "the traditional 'notions of fair play and substantial justice' central to the assertion of jurisdiction are in fact furthered by [this] decision". Pet. App. at A-26. The court specifically rejected the wooden approach to jurisdictional inquiry

which Petitioner advances here. "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles". Pet. App. at A-20 *citing, Duris v. Erato Shipping*, 684 F.2d 352, 356 (6th Cir. 1982), *aff'd sub nom., Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529 (1983).

The Pennsylvania Superior Court noted that the standards set forth in *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985) are satisfied here because Petitioner's conduct and connection with the forum state were such that Petitioner could reasonably anticipate being haled into Court there. Pet. App. at A-25-26. The court's decision thus falls squarely within the reasoning of this Court with reference to the issue of fairness:

> [w]here [defendants] purposely derive benefit from interstate activities it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; *the due process clause may not readily be welded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.* And because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually would not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 473-474 [citations omitted; emphasis supplied].

In each case before this Court where due process issues were raised as a result of the exercise of personal jurisdiction over a non-resident defendant, the benefits derived by the non-resident defendant from the forum

related activity have been analyzed to determine whether the exercise of personal jurisdiction withstands Due Process analysis. *Accord, World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (financial benefit to defendant from attenuated or collateral relation to the forum will not support jurisdiction if benefits do not stem from a constitutionally cognizable contact with the forum); *Burger King*, 471 U.S. at 479-480 (jurisdiction proper where non-resident deliberately reached out and negotiated with Florida corporation for the purchase of a long term franchise and the benefits that would derive from affiliation with a nationwide organization); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112-113 (1987) (mere awareness or foreseeability as the basis for the exercise of personal jurisdiction exceeds the limits of Due Process Clause); *Kulko v. Superior Court*, 436 U.S. 84, 95, *reh'g denied* 438 U.S. 908 (1978) (jurisdiction improper where financial benefit to non-resident resulted not from activity in forum state but from child's absence from defendant's home state).

Petitioner's reliance on *Rush v. Savchuk*, 444 U.S. 320 (1980) is misplaced. In *Rush*, no nexus existed between the forum, the injury and the contacts of the defendant. Moreover, the non-resident defendant derived no financial benefit from the forum contact. Here, Petitioner derived financial benefit from the forum related contacts of its product line predecessor and the injury arose from the predecessor's activity in the forum. Thus, the holding of *Rush* is not applicable to the facts of this case. Because the Pennsylvania Superior Court exercised jurisdiction over Petitioner in such a manner as to satisfy the Due

Process Clause, this Court must decline to issue a writ of certiorari to the Pennsylvania Superior Court.

II. The Pennsylvania Superior Court Decision Does Not Conflict With or Create Confusion Among the Decisions of the Federal Courts of Appeals.

Contrary to Petitioner's contention, the Superior Court decision is *consistent* with the decisions of the Federal Courts of Appeals.

In *Williams v. Bowman Livestock Equipment Company*, 927 F.2d 1128 (10th Cir. 1991), the Tenth Circuit Court of Appeals *expressly adopted* the holding of the Pennsylvania Superior Court, finding that a corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor. *Id.* at 1132, *citing, City of Richmond v. Madison Management Group*, 918 F.2d 438, 454 (4th Cir. 1990). The court in *Williams* declined to exercise personal jurisdiction over the non-resident defendant *only* because application of Oklahoma law would not impose successor liability under the facts of that case.

In *City of Richmond v. Madison Management Group, supra*, the United States Court of Appeals for the Fourth Circuit also expressly adopted the Pennsylvania Superior Court's holding and cited the Superior Court for the proposition that *"the great weight of persuasive authority permits imputation of a predecessor's actions upon its successor whenever forum law would hold the successor liable for its predecessor's actions." Id.* at 454 [emphasis supplied]; Pet. App. at A-14.

The court in *City of Richmond* noted that the "the wholesomeness of that rule is apparent on its face. Every corporation who puts out a lousy product like was done here would avoid all consequences of it by just reforming in some other jurisdiction and avoiding any accountability on it." *Id.* at 455.

Similarly, in *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988), the court found that the "successor" corporation had purchased certain assets from the predecessor but did not assume any liabilities. As stated above, here Petitioner voluntarily assumed liability for the injuries caused by the Thorotrast product line.

Because the Pennsylvania Superior Court's decision does not conflict with the decisions of the Federal Courts of Appeal, Petitioner's Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Superior Court of Pennsylvania should be denied.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause permits the establishment of *in personam* jurisdiction over a successor corporation based upon the contacts of its predecessor corporation with the forum state where the successor corporation agreed to assume the predecessor's liabilities and benefited from the predecessor's contacts with the forum state and thus, should reasonably anticipate being haled into the forum state to answer for its predecessor's actions and/or omissions?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. History of the Case

Petitioner, Chromalloy Pharmaceutical, Inc.'s ("CPI") petition arises from a products liability action filed against CPI and others in 1987 in the Court of Common Pleas of Philadelphia County, Pennsylvania.

The relevant action before this Court was brought by Sherrie Simmers, her husband and her son for damages sustained by Mrs. Simmers as a result of the administration of Thorotrast while she was a patient at Children's Hospital of Philadelphia in May 1949.[1] CPI's connection to this action is by virtue of its status as a successor to the Heyden Chemical Corporation ("Heyden") which manufactured Thorotrast between 1930 and 1953.

In 1953, Heyden sold its antibiotic division, which manufactured Thorotrast, to American Cyanamid Corporation ("Cyanamid") (Petitioner's Appendix at A3). The November 3, 1953 Sales Agreement, in part, provided that Cyanamid was to ". . . duly assume as of closing provided herein all obligations of HEYDEN thereafter arising under all licenses, rights, permits, leases, agreements and contracts assigned by HEYDEN to CYANAMID . . ." (A3).

In 1954, Cyanamid sold its Thorotrast product line to Testagar and Company ("Testagar"). The Cyanamid-Testagar Sales Agreement contained a hold harmless clause under which Testagar

---

1. Thorotrast is the phamaceutical brand name for colloidal thorium dioxide which is a radioactive contrast dye medium used to perform diagnostic x-rays. By the late 1940's and continuing to the present date, scientific literature and FDA regulations concerning the use of thorium dioxide products explained the medical risk of using Thorotrast, especially an increased risk of cancer (A24).

agreed to indemnify Cyanamid "against any claim for personal injuries, damages or destruction of property . . . arising out of this Agreement, the use, handling or inherent characteristics of the material sold hereunder." (A4, fn. 5). In 1974, through a series of statutory mergers, CPI became the corporate successor to Testagar (A4-A5). At this stage of litigation, while there is no evidence that CPI ever manufactured or distributed Thorotrast, CPI through its O'Neil, Jones and Feldman division, had filed a new drug application for Thorotrast with the Food and Drug Administration with said application being withdrawn in 1977 (A4-A5).

In the *Simmers* action, CPI filed preliminary objections in the nature of challenges to *in personam* jurisdiction, with said preliminary objections being denied (A34). The trial court certified the question of personal jurisdiction to the Pennsylvania Superior Court for immediate appellate review (A32). The cases were consolidated for appeal before the Superior Court of Pennsylvania (A31). On June 12, 1990, the Pennsylvania Superior Court affirmed the trial court's ruling (A28). On February 22, 1991, the Pennsylvania Supreme Court denied CPI's petition for allocatur (A29).

B. The Decision of the Pennsylvania Superior Court

The Pennsylvania Superior Court defined the issue before it as

> Whether the forum-related contacts and actions of a predecessor corporation may be attributed to its successor for the purposes of establishing *in personam* jurisdiction.

(A2).

In deciding this issue, the Superior Court recognized that

the application of principles of tort liability was not a substitute for an analysis of whether CPI had the requisite minimum contacts with the Commonwealth of Pennsylvania necessary to satisfy the Due Process Clause (A16). Indeed, the Superior Court specifically recognized that any discussion as to CPI's liability was simply by way of analogy as similar concerns arise in determining when a corporation may be called to answer for the acts or omissions of its predecessor and when a corporation may reasonably expect to be haled into court to defend a claim against it based upon the acts and/or omissions of its predecessor (A15).

After analyzing whether sufficient minimum contacts existed between the Commonwealth of Pennsylvania and CPI, the Superior Court held that the trial court's decision to assert *in personam* jurisdiction over CPI was proper. The Superior Court correctly stated that a corporation which assumes another's liabilities and assets should reasonably expect to be haled into court to answer for those liabilities in those jurisdictions in which its predecessor was doing business or had sufficient minimum contacts to render it subject to jurisdiction (A25).

Thus, in reaching its decision, the Superior Court correctly determined that, consistent with principles of due process, CPI had the requisite minimum contacts with the forum state such that CPI could reasonably anticipate being haled into court in the Commonwealth of Pennsylvania.

REASONS FOR DENYING THE WRIT

The Superior Court of Pennsylvania correctly applied the decisions of this Court in reaching its conclusion that traditional notions of "fair play and substantial justice" would be furthered by the imposition of *in personam* jurisdiction over CPI. There is certainly nothing contrary to a holding of this Court in finding that an entity which assumes the liabilities of a predecessor

corporation should not reasonably expect to be haled into a forum where that predecessor was doing business or subject to jurisdiction to answer for that predecessor's actions and/or omissions. Alternately, there is no reason for this Court to review a decision of the Pennsylvania Superior Court which is in harmony with precedent of this and other courts of competent jurisdiction and which is not in conflict with the Due Process Clause.

I.

CONSISTENT WITH THE MANDATE TO DUE PROCESS CLAUSE AND PRIOR DECISIONS OF THIS COURT, THE SUPERIOR COURT OF PENNSYLVANIA CORRECTLY HELD THAT CPI WAS SUBJECT TO *IN PERSONAM* JURISDICTION.

A state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist "minimum contacts" between the defendant and the forum state. *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Burger King v. Rudzewicz,* 471 U.S. 462, 475 (1985). "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum and it acts to ensure that the states through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 290, 291-292 (1980).

The protection against inconvenient litigation is usually described in terms of "reasonableness" or "fairness". This Court

has stated that a defendant's contacts with the forum state must be such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington, supra* at 316 quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U.S. at 317. The defendant's conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson, supra* at 297.

In requesting this Court to review the Superior Court's decision, CPI argues that the Superior Court's decision was improper because it substituted tort theories of successor liability in place of a determination as to whether CPI had the requisite minimum contacts to create a substantial connection with the Commonwealth of Pennsylvania such that CPI could reasonably anticipate being haled into court there.[2] (Brief of Petitioners at pages 5-9). This is, of course, untrue.

In determining whether the assertion of *in personam* jurisdiction over CPI was proper, the Superior Court noted:

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2. Indeed, whether it is reasonable to require a corporation to defend a particular suit in a particular forum is a primary concern, what is reasonable may be considered in light of other relevant factors including the forum state's interest in adjudicating a dispute, *see McGee v. International Life Insurance Company,* 355 U.S. 220, 223 (1957), and the shared interest of the several states in furthering fundamental substantive social policies. *Kulko v. California Superior Court,* 436 U.S. 84, 93, 98 (1978). The Superior Court recognized that its decision, while not based upon public policy considerations, would, in fact, further the public policy of the Commonwealth of Pennsylvania in providing protection for its citizens who are injured through the use of products whose manufacturers no longer exist in their original corporate form (A24-A25).

> In view of the similarity of concerns with respect to jurisdiction and liability, certain analogies between the law of successor liability are useful to determine whether a predecessor corporation and its successor are one and the same for jurisdictional purposes.

(A16). In so stating, the Superior Court recognized that the application of principles of tort liability is not a substitute for an analysis of whether CPI has the requisite minimum contacts with the Commonwealth of Pennsylvania necessary to satisfy the Due Process Clause, and that any discussion as to the principles of successor liability was simply by way of analogy (A15-A16).[3] Clearly, the Superior Court's decision to uphold the trial court's assertion of *in personam* jurisdiction over CPI was not based on substantive product liability law.

After analyzing whether sufficient minimum contacts existed between the subject matter of litigation and CPI, the Superior Court held that the trial court's decision to assert *in personam* jurisdiction over CPI was proper. The Superior Court stated:

> When a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect consents to be held liable in the same locations where its predecessor would have

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3. In discussing this particular aspect of its opinion, the Superior Court quoted, with approval, Judge Caleb M. Wright in *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939 (D. Del. 1977) who stated:

> Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business with a state [i.e., assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business.

> been exposed, i.e., consents to the same jurisdictional qualities of its predecessor. The provisions of the Due Process Clause are not violated by imputing the predecessor's actions and forum contacts upon a successor.

(A25). The Superior Court quite properly recognized, as this Court has, in prior decisions, it is eminently fair and reasonable, taking into account the realities of modern corporate behavior, that a corporation should expect to be haled into court in those forums in which its predecessor was subject to jurisdiction. Further, it would be unreasonable, as the Superior Court realized, to assume that corporate transactions are planned and executed in a vacuum, without contemplating the ramifications of those transactions, including the extent to which a successor corporation may be called to answer for its predecessor's actions and/or omissions in those forums in which its predecessor was doing business or had the requisite minimum contacts to be subject to *in personam* jurisdiction.[4]

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4. This Court, as early as 1958, noted that one of the factors which led this Court to revise the rigid standard for *in personam* jurisdiction annunciated in *Pennoyer v. Neff*, 95 U.S. 714, for the more flexible standard contained in *International Shoe Co. v. Washington, supra,* was the fundamental transformation in the American economy brought about by improvements in transportation and communication, factors which the Superior Court recognized as being relevant in rendering its decision. *Hanson v. Denckla,* 357 U.S. 235, 250-251 (1958); *McGee v. International Life Ins., supra,* 355 U.S. at 222-223. As the Superior Court stated:

> No doubt in today's sophisticated world of corporate takeovers, a corporation, which assumes another's liabilities or purchases another's product line, seriously considers the possible extent of any liabilities and where those liabilities may exist. We are convinced that the traditional notions of "fair play and substantial justice" central to the assertion of jurisdiction are in fact furthered by today's decision.

(A25-A26).

Under these circumstances, the imposition of jurisdiction is manifestly fair especially when this Court considers, as the Superior Court realized, that CPI derived some benefit from Heyden's presence in the Commonwealth through the use of Heyden's assets and its contacts with the forum (A24-A25).

II.

THE PENNSYLVANIA SUPERIOR COURT'S DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT AND OTHER COURTS OF COMPETENT JURISDICTION AND DOES NOT PRESENT A SUBSTANTIAL QUESTION OF JURISDICTION WHICH NEED BE RESOLVED BY THIS COURT.

CPI has alleged that the Superior Court's holding is in conflict with the holding of several federal courts of appeals which have considered the issue of whether a predecessor corporation's contacts may be attributed to a successor corporation for the purpose of establishing jurisdiction (Petitioner's Brief at pages 9-10). CPI also alleges that whether a predecessor corporation's contacts may be attributed to a successor corporation for purposes of establishing jurisdiction over the successor has been addressed by the courts of the several states and that a conflict has arisen as to the manner in which this issue is to be addressed (Petitioner's Brief at pages 10-12).

The apparent inconsistencies and conflicts which CPI believes warrants review of the Superior Court's decision may be harmonized by examining the reasoning behind the decision reached by those courts which have addressed the issue currently before this Court.

In those cases in which it was held that a successor corporation may reasonably expect to be haled into a forum to answer for

the acts and/or omissions of its predecessor, the courts found that the successor had expressly or impliedly assumed the predecessor's assets and liabilities or there was no distinction between the successor and the predecessor.[5] These decisions are consistent with traditional notions of fair play and substantial justice when one considers, that the successor corporations enjoyed the benefits of their predecessors' presence in the forum state and should expect to be haled into those forums where their predecessors did business especially when the successors voluntarily assumed their predecessors' liabilities. The decisions contrary to this line of cases are not applicable,[6] wrongly decided or involved

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5. In *Duris v. Erato Shipping Inc.*, 684 F.2d 352 (6th Cir. 1982), *affirmed on other grounds, Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529 (1983) the Court held that where the predecessor corporation merged into the successor corporation, the contacts of the predecessor would be deemed those of the successor for jurisdictional purposes. In *Cole v. Catapillar Machinery Corp.*,562 F. Supp. 179 (M.D. La. 1983), the District Court held that where a successor corporation to a merger assumed both the assets and liabilities of its predecessor, it could still be subject to *in personam* jurisdiction without offending due process despite the fact it had no contacts with the forum since it derived a benefit from its predecessor's presence in the forum state and should reasonably expect to answer for liabilities incurred by its predecessor with the forum. In *Bowers v. Neti Technologies Inc.*, 690 F. Supp. 349 (E.D. Pa. 1988), the District Court found that evidence that a non-resident corporation was created for the purposes of usurping the assets, business and operations of its predecessor while avoiding responsibility for its predecessor's debts, could have reasonably anticipated being haled into Pennsylvania to answer for that predecessor's actions. In *Goffe v. Blake*, 605 F. Supp. 1151 (D. Del. 1985), the District Court held that the actions and conduct of the constituent corporation could be attributed to its successor following a merger for the purpose of determining the successor's amenability to jurisdiction for the liability of its predecessor. In *City of Richmond, Va. v. Madison Management Group*, 918 Fed.2d 438 (4th Cir. 1990), the court held that where a successor corporation had implicitly assumed its predecessor's liabilities, the successor corporation would be amenable to jurisdiction based upon its predecessor's contacts with the forum state.

6. In *Johnston v. Pneumo Corp.*, 652 F. Supp. 1402 (S.D. Miss. 1987),

(Cont'd)

transactions in which the successor did not assume the predecessors' liabilities and, therefore, could not be expected to be haled into court to answer for its predecessors' actions.[7]

(Cont'd)
the District Court held, in contradiction to the great weight of persuasive authority, that a successor corporation could not be amenable to jurisdiction based upon its predecessor's contacts with the forum state despite the fact that the successor had agreed to assume all the assets and liabilities of the predecessor corporation. In *Sullivan v. Fellows Testagar & Co., Inc.*, 518 So. 2d 111 (La. App. 1987), the court held that an agreement to indemnify a corporation which had agreed to indemnify another corporation was not sufficient to assert *in personam* jurisdiction over a non-resident defendant.

7. In *Williams v. Bowman Livestock Equipment Company*, 927 F.2d 1128 (10th Cir. 1991), the Court of Appeals held that where the "successor" came into existence when the predecessor's assets were liquidated and debts discharged by a secured creditor or through Chapter 7 bankruptcy proceedings; there was neither a statutory merger nor consolidation of the predecessor and successor nor a sale or transfer of all, or substantially all of the predecessor's assets to the successor, jurisdiction should not be imposed upon the successor for the predecessor's acts in the forum state. In *Wines v. Lake Havasu Boat Mfg. Inc.*, 846 F.2d 40 (8th Cir. 1988) the court held that defendant's predecessors' contacts with the forum state could not be attributed to the defendant, for purposes of personal jurisdiction, where defendant's predecessor purchased certain assets from the corporation but did not assume any liabilities. In *Inter-America's Insurance Corp. v. Xycor Systems, Inc.*, 757 F. Supp. 1213, 1218 (D. Kan. 1991), the District Court held that it would be inappropriate to exercise jurisdiction over a successor based upon its predecessor's contacts with the forum where the successor did not expressly or impliedly assume the liabilities upon which plaintiff's cause of action was based. In *Fehl v. S.W.C. Corp. supra*, the District Court held that a successor corporation could not be held amenable to jurisdiction based upon the acts of its predecessor where the transaction amounted to a transfer of assets for cash only, and there was no agreement to assume any of the predecessor's liabilities by the successor corporation.

CONCLUSION

For the foregoing reasons, CPI's petition for writ of certiorari should be denied.

Respectfully submitted,

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